UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH

APEX LINEN SERVICE INC.

and

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 501, AFL–CIO

and

ADAM ARELLANO, an Individual

Cases: 28–CA–192349
28–CA–192774
28–CA–193126
28–CA–193231
28–CA–196285
28–CA–196459
28–CA–197069
28–CA–197182
28–CA–197190
28–CA–198033
28–CA–202027
28–CA–202209
28–CA–203269
28–CA–193128

Nathan A. Higley, *Esq.*, for the General Counsel.
John M. Naylor, Esq. and *Andrew J. Sharples, Esq. (Naylor & Braster)*, for the Respondent.
Adam N. Stern, Esq. (The Myers Law Group) for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. The dispute in this case stems from the events that followed an organizing drive by International Union of Operating Engineers Local 501, AFL–CIO (Union or Local 501) among the engineering department employees of Apex Linen Service, Inc. (Respondent or Employer), which culminated with the Union prevailing in an election. At issue is whether Respondent unlawfully interrogated and threatened its employees; whether Respondent terminated 3 of its employees because of their support for the Union and failed to bargain with the Union regarding such actions; whether Respondent made

unilateral changes without bargaining with the Union; whether Respondent failed to bargain in good faith during negotiations by not submitting counter proposals and not investing authority in its negotiator to agree to proposals; and whether Respondent failed to provide the Union with information it requested.

I. PROCEDURAL BACKGROUND

Based on charges filed by the Union and by Adam Arellano, an individual (and alleged discriminatee) in the above-captioned cases, the Regional Director for Region 28 of the Board issued a consolidated complaint on August 31, 2017, alleging that Respondent had violated Sections 8(a)(1), (3), and (5) of the Act by engaging in the above-described conduct. On October 10, 2017, the first day of hearing, the General Counsel moved to amend the consolidated complaint, a motion which I granted. For the sake of clarity, I directed the General Counsel to issue an amended complaint tracking the changes made, which the General Counsel did on December 17, 2017, after the hearing had closed. I presided over this case in Las Vegas, Nevada on October 10, and December 4 through 6, 2017.[1]

II. JURISDICTION AND LABOR ORGANIZATION STATUS

The complaint alleges, and Respondent admits, that at all material times it has been a Nevada corporation with an office and place of business in Las Vegas, where it has been engaged in the operation of a commercial laundry facility. The complaint further alleges, and Respondent admits, that during the 12-month period ending on February 2, 2017, in conducting the business operations described above, Respondent derived gross revenues in excess of $500,000, and during the same time period purchased and received goods valued in excess of $5,000 directly from points outside the State of Nevada. Accordingly, Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint further pleads that the Union is a labor organization within the meaning of Section 2(5) of the Act, which Respondent denied in its answer. I conclude that the Union's status as a labor organization within the meaning of the Act is not truly in contention or in doubt, for a number of reasons. First, I take judicial notice of the fact that the Union has been representing employees in the Las Vegas area and other areas for many years and has been previously found by the Board and the courts to be a labor organization within the meaning of the Act. See, *Operating Engineers, Local 501 (Golden Nugget Las Vegas)*, 366 NLRB No. 62 (2018); *Hilton Hotel Corp.*, 287 NLRB 359 (1987); *Operating Engineers, Local 501(Anheuser Busch, Inc.)*, 199 NLRB 551 (1972), remanded and reversed on other grounds, 217 NLRB 207 (1975). Second, the over-all record in this case, as well as the record in the underlying representation proceedings in Case 28–RC–191728, clearly establishes that the Union is a labor organization within the meaning of the Act. In that regard I note that Respondent never challenged the certification of the Union as the representative of a unit of its employees in case 28–RC–191728 (GCX-4), a certification that would not be legally possible if the Union was not

[1] The hearing in this matter opened on October 10, 2017, and was scheduled to continue during the remainder of that week, but unfortunately I became ill at the end of the first day and the hearing had to be continued until December 4.

a bona fide labor organization. Indeed, Respondent recognized and bargained with the Union as such following its certification by the Board, as will be discussed below with regard to the alleged unfair labor practices in the instant case. In these circumstances, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS

A. Background[2]

As briefly described above, Respondent operates a commercial/industrial laundry facility in Las Vegas, servicing hotels, restaurants and casinos in the area since 2011. At the time of the hearing, it employed proximately 250 employees, including about a dozen employees in its engineering department who are represented by the Union and who are the subject of many of the allegations of the complaint. The function of the engineering department employees is to repair and maintain equipment throughout the plant.

Glen "Marty" Martin (M Martin) is Respondent's chief operating officer and part owner of the company, owning a certain percentage of its stock, and manages Respondent's day-to-day operations.[3] He reports to Joseph Dramise (Dramise), Respondent's chief executive officer and principal stockholder. Kevin Scott (Scott) is director of engineering I and Keith Marsh (Marsh) is director of engineering II, both of whom report to M Martin, perform slightly different functions in the engineering department but have an equal rank. Reporting to them is Eugene "Gene" Sharron (Sharron), the chief engineer, whom the engineers report to. Finally, Cristina Linares, who reports to M Martin, is the dry cleaning manager, and as implied by her title she works in the dry cleaning department, a department separate and apart from the engineering department. All of these individuals, except for Scott, who did not testify, admitted they had authority to discipline employees, or to effectively recommend such discipline, and or/to assign or otherwise direct their work, grant them time off, and having other similar indicia of Section 2(11) supervisory authority. Accordingly, the record unquestionably supports the conclusion that these individuals are statutory supervisors, and their status as such is not truly contested by Respondent, and indicated above.[4]

In the summer and fall of 2016, the Union began organizing the employees of Respondent's engineering department, holding meetings at various locations and eventually collecting signed authorization cards from them. Sometime in January 2017, the Union filed a

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[2] The facts summarized in this section are not in dispute, either because they were admitted in the answer or unquestionably admitted by managerial representatives of Respondent during their testimony, or by other employees whose testimony was never contradicted or rebutted. Accordingly, I chose not to cite any transcript pages in this section. As further discussed below, while Respondent in its answer denied the supervisory status of all of its principals and managers, this denial appears to be pro forma, as their status as supervisors is not seriously in question. Indeed, Respondent does not even raise the issue of the supervisory status of those alleged to be statutory supervisors in paragraph 4 of the complaint.

[3] I use "M Martin," who frequently is referred to throughout the record as "Marty," to distinguish him from Charles ("Ed") Martin (E Martin), the Union's principal representative in this matter and also a witness in the case, who is referred to throughout the record as "Ed."

[4] As for Scott, he is not directly involved in any of the conduct alleged in the complaint, but nevertheless the record indicates his rank is the same as Marsh's, which would also make him a statutory supervisor.

representation petition in case 28–RC–191728, seeking to represent a certain unit of employees in Respondent's engineering department. Shortly after the filing of the petition, and about a day or two before Respondent received a copy of the petition in the mail from the Board, Union Representative Charles "Ed" Martin (E Martin) paid the Respondent a visit. He met with M Martin, and informed him that the Union was organizing his engineering department employees.

The representation petition culminated in a stipulated election agreement executed by Respondent and the Union on January 31, 2017, and approved by the Regional Director on the same date.[5] Pursuant to that agreement, an election was conducted on February 6 in which the Union received a majority of the ballots cast, and on February 15 the Regional Director certified the Union as the collective bargaining representative of a unit of Respondent's employees.[6]

It is Respondent's alleged conduct in the wake of these events, except for the pre-existing Employee Handbook provisions described below, that is the subject of the allegations of the complaint before me.

B. The Factual Allegations of the Complaint

1. The Employee Handbook[7]

It is alleged, and Respondent admits, that its Employee Handbook contains the following rule which Respondent maintains:

> While an Employee's free time is generally not subject to any restrictions by the Company, with the exceptions of the limited restrictions above, the Company urges all employees to refrain from posting information regarding the Company that could embarrass or upset co-workers or that could detrimentally affect the Company's business. Employees must use their best judgment. Employees with any questions should review the guidelines above and/or consult with their manager. When in doubt, don't post. Failure to follow these guidelines may result in discipline, up to and including termination.[8]

There is no allegation, or evidence, that Respondent has disciplined or otherwise taken any action against any employee for violating the above-cited rule.

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[5] All dates hereafter shall be in calendar year 2017 unless otherwise indicated.

[6] The unit for which the Union was certified as representative was as follows: All full-time, regular part-time and extra board Engineers and Utility Engineers employed by the Employer at its facility located in Las Vegas, Nevada; excluding, all other employees, office clerical employees, guards and supervisors as defined in the Act. (GCX 4). As noted above, Respondent never challenged the validity of the bargaining unit or the certification before the Board.

[7] Initially, Paragraph 5(a) of the complaint alleged several sections of the Employee Handbook as unlawful. Post-hearing, in the wake of the Board's ruling in *Boeing Co.*, 365 NLRB No. 154 (2017), the General Counsel withdrew most of the allegations with regard to the Employee Handbook, except for the specific language cited below, which is covered under Paragraph 5(a)(iii) of the complaint.

[8] This language is contained in Section 5-4 of the Employee Handbook, under the heading of "Use of Social Media." The guidelines referenced in the above-quoted language are contained just above the quoted portion, in the same section. That earlier section, as well as other sections in the Employee Handbook were initially alleged in the complaint as being unlawful, but were withdrawn by the General Counsel post-hearing, as noted above.

2. The alleged conduct by Sharron about January 24[9]

As described above, shortly after the Union filed the representation petition, and a day or two before Respondent received a copy of the petition in the mail, Union Representative E Martin paid Respondent a visit. He met briefly with M Martin and informed him that the Union was organizing his engineering department employees. M Martin admitted that after E Martin left, he asked Sharron, the chief engineer, if he knew anything about the engineers organizing a union, and Sharron said he did not. A day or so later Sharron told M Martin that he had asked the engineers, and that he was upset because he had not known about it (Tr. 39–42).

Joseph Servin (Servin), who at the time was employed by Respondent as an engineer, testified that about January 24 Sharron approached him and asked if he knew anything about a union trying to organize the employees. Servin, who had in fact been part of the organizing effort, denied knowing anything. Sharron then told Sevin the Union is "just interested in taking my money, and I'd only get $25 on my check, and that's all they'd be interested in, just taking my money." Sharron also asked Servin how he would vote. Servin again pled innocence, saying he did not know anything. (Tr. 528–530).

Sharron testified that after he learned from M Martin about the Union's organizing activities, he asked the engineers, "one by one," if they were trying to bring a union in. He did this mostly in person, but also by phone. According to Sharron, they all said no. Sharron specifically remembered asking Servin and fellow engineer Adam Arellano, both whom denied knowing anything. Sharron then reported his findings to M Martin. He did not address Servin's testimony regarding what he said about unions only wanting money, so I credit Servin. (Tr. 364–367).

In light of the testimony described above, I conclude there is no need to make credibility findings regarding the alleged conduct, because Sharron not only admitted asking Servin about his union activity, but admitted asking other employees as well—and did not deny the rest of Servin's testimony.

3. The alleged conduct by Sharron about January 25[10]

Adam Arellano (Arellano), at the time employed by Respondent as an engineer, testified that about January 25 he was in the parts room when Sharron asked him, in Keith Marsh's and Kevin Scott's presence, if "you guys want the Union."[11] Arellano replied that he did, because he had come from a union company, and Sharron then told him that he was going to call everyone and ask them if they wanted a union. (Tr. 490). As with the alleged January 24 incident discussed above, I conclude there is no need for credibility findings, since Sharron admitted asking Arellano as well as others about the union. The only additional detail provided by Arellano about this encounter was regarding Marsh's and Scott's presence when this occurred,

[9] As alleged in paragraph 5(b) of the complaint.
[10] As alleged in paragraph 5(c) of the complaint.
[11] As described in the background section, Marsh and Scott are both directors of the engineering department.

something that was not denied by them or Sharron. Accordingly, I credit Arellano's testimony in that regard.

4. The alleged conduct by Dramise and Sharron about February 1[12]

Arellano testified that about February 1, he and Servin were summoned by Sharron to come to the conference room to meet with Joe Dramise (Dramise), Respondent's chief executive officer (and principal stockholder). Also present at this meeting was Sharron. According to Arellano, Dramise told him and Servin that if the votes were in favor of the Union (in the upcoming scheduled election), Respondent would not honor the schedules, benefits and vacations that they had in place. Arellano simply responded "OK." Servin also testified that he and Arellano were summoned to this meeting in the conference room, which took place about February 1. At the meeting, Dramise told them that if the Union came in, Respondent would not honor their "contracts," which Servin understood to mean the terms and conditions of their employment, such as days off, hours, and rates of pay. Servin explained that when he was hired, he was promised he would work weekdays and have weekends off, and that Respondent would pay for his health benefits. According to Servin, neither he nor Arellano responded to Dramise, because they were afraid to do so, and they were told to return to work. (Tr. 493–495; 530–533).

In his testimony, Dramise admitted that he had a meeting with Arellano and Servin on February 1, although he did not recall if the meeting was held at his request. He testified that the purpose of the meeting was to let Arellano and Servin know that Respondent was aware of the union vote and that their "contract" would have to be "re-negotiated" with the Union—although he admitted there was no contract in place with the employees. Sharron testified that he was instructed by Dramise to call the engineers to a meeting at the conference room, and that Arellano and Servin were the only ones on shift at the time. During the meeting, Dramise told them if they got in a union, there would be a new contract with the union and that the employees' contract would be "null and void," which he understood to mean that as far as personal time off (PTO), pay and other conditions would be up to the union. According to Sharron, neither Arellano nor Servin said anything. (Tr. 339–341; 369–370).

As with the previously described allegations, I conclude that there is little need for a credibility resolution with regard to what occurred at this meeting on February 1, since there is little difference in the version of events by the witnesses, who agree on the essential facts: Arellano and Servin were summoned to a meeting in the conference room, and were told by Dramise that if the Union came in, their conditions of employment would no longer be in effect.[13]

Additionally, Servin testified that sometime in early February, Sharron spoke to him on the shop floor. Sharron told Servin that he had figured out who the union supporters were, and named Arellano, Charles Walker (Walker) and Rico (last name unknown). Sharron said that he figured Arellano was a strong union supporter, Walker was always worried about losing his job, and Rico had been injured recently. Sharron added that since the Union needed 30 percent

[12] As alleged in paragraphs 5(d) and 5(e) of the complaint

[13] To the extent that a credibility resolution is needed, however, I credit the version by Arellano and Servin, whose testimony is not only corroborated by each other, but by Sharron as well.

support to file a petition, and hence he came up with those 3 individuals. (Tr. 534–535). Sharron did not deny making these statements, and hence I credit Servin's testimony.

5. The alleged conduct by Dramise on or about April 4[14]

The complaint alleges that about April 4 Dramise "threatened… employees with discharge if they engaged in protected concerted activity." According to the evidence presented, as well as the General Counsel's brief, however, it appears that this alleged threat was directed at a single particular employee, Servin, and may have been implied rather than explicit. Thus, Servin testified that on or about April 4 he was concerned, as had occurred on other occasions, that the sheets employees had to work with were coming out (of the washing or drying machines, presumably) too hot, with a potential for scalding anyone who handled them. As he had done in previous occasions, Servin placed a thermometer between the sheets, which showed a temperature between 120 and 130 degrees, and took a photo with his cell phone of the thermometer. He then texted the photo(s) to Marsh to express his concern about the issue.[15] (Tr. 540–542).

M Martin testified that while sitting in his office, he saw Servin in a security monitor placing something in the sheets and taking a photograph. He went down to the plant and together with Marsh, approached Servin and asked him what he was doing. Servin showed him the thermometer and explained the situation, which Marsh did not consider to be a problem, informing Servin that no further adjustments needed to be made. Within an hour or so, Servin was summoned to the conference room, where he met with M Martin, Dramise, and Marsh. At the onset of the meeting, M Martin told Servin he was being terminated for taking photos inside the plant, which M Martin presumed were being sent outside the plant. M Martin had prepared a termination notice, which he placed on the table in front of Servin, but never actually handed to him.[16] Servin explained that he had taken photos showing the temperature of the towels and that he had texted them to Marsh, which Marsh confirmed. M Martin and Dramise then stepped outside to discuss the situation, and they concluded that Servin had done nothing wrong under the circumstances. They came back to the conference room and informed Servin that the discharge had been rescinded, and directed him to return to work. (Tr. 98–104; 304–316; 343–349; 540–544)

Neither M Martin, Dramise, nor Marsh could clearly articulate the reason why Respondent had intended to discharge Servin on April 4, a discharge that was rescinded before it

[14] This conduct is alleged in paragraph 5(i)(2) of the complaint. Paragraph 5(i)(1) of the complaint was withdrawn by the General Counsel. It should also be noted that the factual allegations in paragraph(s) 5(f), 5(g), and 5(h) of the complaint, which immediately precede this allegation, will be discussed in the following section, because they are intimately tied to the allegations regarding the February 13 discharge of Arellano alleged in paragraph 6(a) of the complaint.

[15] Servin testified he had done this in the past, most recently at the end of March. At the time, Marsh had informed him that he saw no problem with the temperature of the sheets, which he considered normal, and did not in any way object to Servin taking photos in this manner. Indeed, chief engineer Sharron testified that this was a useful and common practice among the engineers. (Tr. 304–306; 372–373; 541)

[16] Servin took a photo of the termination notice a few minutes later when M Martin and Dramise stepped out of the room to discuss the events, as discussed below. This document, introduced as GCX 11, shows a form signed by M Martin advising Servin that he was terminated for violation of "company policy." As discussed below, the discharge was rescinded a few minutes later, and the termination notice was never handed to Servin.

was implemented. Although M Martin testified that he told Servin he was violating company policy for either using the cell phone or taking photographs with it inside company property, no such rule appears to exist in the Employee Handbook (GCX 2). Moreover, Respondent knew that Servin, as well as other engineers, had been taking photos inside the plant and sending these to the chief engineer or engineering director(s) for quite some time, which M Martin admitted had never been an issue (Tr. 98).[17] Indeed, the record suggests that engineers and other employees continue to use cell phones inside the plant to this date. In his testimony, however, M Martin gave a hint of the real reason for this episode, testifying that it was "trust issue," although he never explained the reason for the sudden mistrust of Servin.

As discussed below, this event may ultimately have served as a type of "dress rehearsal" for Servin's eventual discharge. It is clear however, that contrary to what is alleged (in paragraph 6(c) of the complaint, Servin was not discharged on April 4.

6. The termination of Arellano, Walker and Servin

(a) Arellano[18]

Arellano was the second most senior engineer, hired by Respondent in the summer of 2011 shortly after it began operations.[19] He was considered to be a "good worker" and "talented troubleshooter," as admitted by M Martin, and in August 2013 received the "Employee of the Month Award."[20] As also admitted by M Martin, Arellano had no history of problems or discipline at work. (Tr. 43–48; 488–490)

Arellano, who had previously worked at a unionized facility, contacted the Union in July 2016 to express interest in having Respondent's engineers organized. He arranged several meetings between union representatives and his fellow engineering department employees over the next several months. He also solicited authorization cards, which were signed and submitted to the Union sometime in early January 2017. As described earlier, the Union filed a petition with the Board shortly thereafter, and Union Representative E Martin paid Respondent a visit a day or two later, to advise that the Union was organizing the engineers. As also discussed earlier, shortly thereafter Sharron asked Arellano and the others whether they knew anything about the Union, and on February 1, Dramise warned Arellano and Servin about the consequences of the Union coming in (Tr. 496–501).

On the day of the Board election, Monday February 6, Arellano wore a union button to express his support for the Union. As described above, the Union prevailed in the election that day. On Friday February 10, Union Representative E Martin phoned Arellano, who was on his day off, to come to the Union hall because they needed to speak. When Arellano arrived at the union office, E Martin informed him that Respondent intended to discharge him for

[17] Yet, curiously, Marsh testified that this activity by Servin was no longer seen as "appropriate," because of concern that this photos might be going "off site." (Tr. 316)

[18] As alleged in paragraph 6(a) of the complaint

[19] The first one hired was Servin, as discussed below (Tr. 488)

[20] The award (GCX 5) was discontinued shortly thereafter. Arellano's employee evaluation in September 2013 (GCX 6(a) &(b)) also reflects his good standing at the time. For reasons that are not clear, Respondent apparently ceased to perform yearly evaluations after this time.

"misconduct," related to an allegedly fraudulent worker's compensation claim. Arellano had a good idea what this was about, and wrote a statement about what had occurred at E Martin's request. There is no dispute that Respondent discharged Arellano on Monday, February 13, the next day he came to work, as described below (Tr. 501–502). What follows is the account of the event(s) that led to his discharge.

According to Arellano, on the day in question he was working in the dry cleaning department when Veronica Hernandez (Hernandez), an employee in that department, called him to come over.[21] Hernandez asked Arellano to open a bottle (or jug) of a chemical (stain cleaner) used for dry cleaning purposes, which she apparently was having trouble opening. Arellano used one of his tools to open the bottle, which he then handed to Hernandez. He noticed that one of Hernandez's eyes was very bloodshot, and asked what had happened to her eye. Hernandez said that she did not know, that something had probably gotten into her eye and it was bothering her. Arellano told her that if it occurred here (meaning at work), she should report it immediately to the supervisor so they would have a record of it, even if she did not go to the doctor, that she could go to the doctor later if it got infected. Hernandez responded that she did not know if it had happened at work, and as the conversation ended Arellano told her that she should be using her safety glasses (or goggles) because she was working with chemicals[22] (Tr. 503–504).

Hernandez's version of her conversation with Arellano is somewhat different than Arellano's, although it was not as detailed. Hernandez testified that on the day in question, about 2–3 hours after she arrived at work, she noticed her left eye was bloodshot, which was not the case when she had arrived at work. Sometime later, she saw Arellano and asked him to open a bottle of stain remover for her, which he did. Arellano noticed her bloodshot eye and asked what had happened to her eye. Hernandez told him that she did not know. Arellano then told her to inform her supervisor to send her to the doctor, and to say that it had occurred at work. Hernandez told him she could not do that, because it "didn't quite happen at work, exactly."[23] Hernandez admitted that once she explained to Arellano that the injury had not occurred at work, he did not again suggest to her that she should say that it had, and that the conversation ended then (Tr. 592–596; 602).

Hernandez testified that later that morning, she reported her conversation with Arellano to her supervisor, Cristina Linares (Linares), after Linares arrived at work. Linares later asked her to write a statement about her conversation with Arellano. Hernandez wrote a statement in

[21] Arellano did not testify on what date this occurred, but later testimony and documentary evidence indicates this incident occurred on or about February 7, the day after the election (GCX 34).

[22] Arellano explained that safety glasses, which Hernandez was not wearing, are often used by employees in the plant because of potential exposure to chemicals, lint, metal shavings and other debris that is present in the environment. He additionally testified that the company's policy is that employees should report any injuries, even if it's only a scratch, so that they have documentation—which is consistent with Respondent's employee handbook. (Tr. 504–505)

[23] Hernandez explained that she was concerned that if she went to the doctor, he would notice that there wasn't any "liquid" in her eye, apparently referring to a chemical substance, and that she would look like a "liar." She also explained that when they work with chemicals, they are supposed to use protective glasses and gloves, and that she had not been using these because before this she had only been sorting clothing. Hernandez did not testify, however, that she had explained this to Arellano (Tr. 595). Both Arellano and Hernandez testified that their conversation was in Spanish. Indeed, Hernandez testified in Spanish through an interpreter.

Spanish, dated February 7, which she provided to Linares. The statement, in evidence as GCX 34(a), was translated by the Spanish interpreter (at my request) as follows:

> "…this morning, I said hi to Adam, and he asked me about my eye. I answered, I did not know what was happening. And he said to announce this to my bosses, to be sent to a doctor, company doctor, because something had happened there with a chemical. But I responded that nothing had happened here." (Tr. 599–600)

I find there is little need to make a credibility finding with regard to the conversation between Arellano and Hernandez, because while some of the details vary between the two versions, they are consistent in their essence, also corroborated by the contemporaneous statement provided by Hernandez at the time, to wit: Hernandez called Arellano over and asked him to open a bottle of chemical (stain remover) for her; Arellano noticed Hernandez's eye was bloodshot and asked her what had happened, and Hernandez said she did not know; Arellano told Hernandez to report the situation (or injury) to her supervisor(s), to get medical attention; Hernandez then told Arellano that the injury had not occurred at work (or that she wasn't certain that it had); the conversation then ended.[24]

Linares, the dry cleaning department supervisor and Hernandez's immediate supervisor, testified that shortly after she arrived at work, Hernandez approached her and reported her conversation with Arellano. Hernandez told her that Arellano had noticed her bloodshot eye and had asked her what happened, and that she had told him she did not know because she had not woken up with her eye like that. According to Linares, who also noticed Hernandez's bloodshot eye, Hernandez then said that Arellano had told her to say that her eye injury had happened at work.[25] Linares testified she concluded that Arellano had done "something wrong," because he should not be telling her employees to report something that had not happened at work, since Hernandez was not sure it had happened at work.[26] Linares emailed M Martin to report what Arellano had done, and M Martin asked her to come to his office, where she explained to him what Hernandez had said. M Martin asked Linares to get a written statement from Hernandez, and she brought Hernandez to her office to ask her to give her statement. Hernandez provided a short statement, in Spanish, in her own handwriting (Tr. 464–471; 475–476; GCX 34(a)).

M Martin testified that he made the decision to discharge Arellano solely based on what Linares had informed him Hernandez had said to her, and Linares' translation of Hernandez's written statement. He did not interview or speak with either Arellano or Hernandez, but did

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[24] To the extent that a credibility determination is necessary, however, I conclude that Arellano's version was far more detailed and plausible, and therefore more reliable. Additionally, I find that it is very odd, to say the least, that Hernandez felt compelled to go out of her way to report this rather innocuous conversation to Linares, which raises questions about her motivation. Arellano testified that Hernandez confessed to him that Linares had approached her to ask her what she and Arellano had been speaking about, which would provide a feasible explanation that would explain Hernandez's conduct. Both Hernandez and Linares denied that Linares had first approached Hernandez, however, but I find it unnecessary to resolve this conflict, as it ultimately will not alter my conclusions, as discussed below.

[25] This is not the way the conversation actually occurred between Hernandez and Arellano, according to their testimony—and Hernandez's statement.

[26] Linares admitted that she had seen Arellano, as well as other engineers, wearing union buttons before this incident happened (Tr. 484–485).

review a security camera video, which had no audio of what was said, that confirmed that Arellano and Hernandez had had an interaction on the day in question. He prepared and signed Arellano's termination form on February 9. On the termination form, M Martin checked 2 boxes indicating the reason for Arellano's discharge was "Violation of Company Policy," and "Insubordination." Additionally, in the box providing for notes or details, M Martin wrote "violation of hand book 5.1 workplace misconduct—see attached," and immediately below that wrote "Insubordination, dishonesty, willful or careless destruction of company assets" (GCX 7; 8; Tr. 49–53; 55–62; 68–71;).[27] Additionally, on Friday February 10, M Martin sent Union Representative E Martin an email informing him, inter alia, that Respondent was terminating Arellano for "misconduct." In the email, he makes reference to an apparent meeting (with E Martin) that took place the day before, writing as follows: "…[A]s discussed in our meeting yesterday, we have a misconduct issue with Adam Arellano. We hold staff to a high moral and ethical standard. We also have been the victim of untrue organizing techniques from other unions such as repeated false OSHA claims, false workers compensation claims, false sexual harassment claims, unjustified NLRB claims, and in this case we caught someone doing it and are taking appropriate action." (GCX 9(b)).[28]

Arellano testified that on Monday, February 13, a few hours after he had started his shift, he was summoned to M Martin's office, where he arrived along with Keith Marsh. M Martin asked Arellano if he knew why he was there, and Arellano said yes, and then M Martin said that he figured the Union had already told him. Arellano said he wanted to invoke his Weingarten rights, and M Martin replied that his Weingarten rights did not apply because the decision to terminate him had already been made, stating "you are being terminated." M Martin then handed Arellano a termination letter and termination form. He then handed Arellano a piece of paper and pen and told him he could write a statement if he wanted, but Arellano declined, stating that he did not want to write or sign anything without a union representative present. The meeting ended at this point, and Arellano was escorted out (Tr. 507–510; GCX 8).[29] M Martin's testimony about this meeting in essence corroborates Arellano's account, stressing the fact that

[27] M Martin testified that "insubordination" refers to Arellano's alleged attempt to get Hernandez to make a false "workers compensation" claim (Tr. 57), as also explained in a memo he wrote documenting the reasons for Arellano's discharge (GCX 14). He did not explain how the term "insubordination," which means intentional disobedience of a direct order, would fit Arellano's conduct in this instance. In his memo, M Martin also explains that the reference to the "destruction of company assets" was related to apparent sabotage of electrical systems in the plant, for which he blamed Arellano. He admitted, however, that there was in fact no sabotage, but simply normal mechanical failures that Arellano was not responsible for (Tr. 72; 77). It is notable that despite this admission, the references to sabotage were never deleted from the termination notice.

[28] M Martin testified that he had a face-to-face meeting with E Martin on February 9 to discuss several matters, including his decision to terminate Arellano (Tr. 78–79). In his testimony, E Martin denied that he (or the Union) was ever notified about Arellano's termination prior to his discharge, and indeed he testified that he only found out about it from Arellano on Monday, February 13 (Tr. 405). This testimony is contradicted not only by M Martin's testimony and the February 10 email referenced above, but also by Arellano, who testified that he was informed by E Martin of his impending termination when they met at the union hall on February 10 (Tr. 502). Accordingly, I do not credit E Martin's testimony that the Union was never notified about Arellano's discharge prior to its taking place—and find his testimony about his conversations with M Martin during this period wanting.

[29] Arellano admitted that when told that he could write a statement, he understood that he had <u>already</u> been terminated (Tr. 508–509)

he told Arellano that he had already been terminated when Arellano invoked his Weingarten rights, and pointing out that he asked Arellano no questions during the meeting (Tr. 81–83)[30]

(b) Walker[31]

Charles Walker worked as an engineer for Respondent during the graveyard shift, and had the lowest seniority among the engineers, having been the last one hired.[32] Walker served as the sole election observer on February 6, having volunteered at the behest of the Union.[33] There is no dispute that Respondent laid him off on February 15. Walker testified that on that day he was called into a meeting with M Martin in the conference room, along with chief engineer Sharron. According to Walker, M Martin told him he was being laid off, adding that he had wanted to do that for a while. This came as a surprise to Walker, who had not heard anything regarding possible lay-offs. Walker also testified that M Martin also mentioned he did not want the Union to come in, but it had nothing to do with his lay-off . M Martin gave Walker a termination form indicating that he was being laid off because his position had been eliminated (Tr. 86–92; 264; 271; 570–580; GCX 15)).

Additional background information is necessary to understand the context of Walker's lay-off. On Wednesday February 7, the day after the election, M Martin sent an email to E Martin stating as follows: "We want to make a schedule change and layoff. We need your bargaining input before Friday. When would you like to meet?" E Martin responded via email the following day, February 8, stating that before they could meet to bargain about the proposed changes/lay-offs, the Union was requesting certain information, and listed 13 items it was requesting. There were several other follow-up emails between them in the next 24 hours, with M Martin in essence informing E Martin that Respondent needed to make the changes/lay- offs and that Respondent would not be able to provide all the information requested on such short notice, and M Martin responding that due diligence required the Union to have information before they reached an agreement. The parties had a meeting on Friday February 9 to discuss these matters (GCX-23 (a)-(d)).

Additionally, M Martin testified that the last lay off Respondent had implemented has taken place a year earlier, in January 2016, but provided no details as to such lay-off, such as the identity, classification or seniority of those laid off. He explained that typically 3 factors were considered in determining whether lay-offs or reduction of hours in the engineering department took place: productivity in pounds (of laundry); capital projects (typically meaning expansion or

[30] Marsh, who was present at this meeting, testified he did not recall Arellano invoking his Weingarten rights or M Martin telling Arellano to write a statement (Tr. 301–302). Needless to say, as will be discussed later, Marsh's recollection of many events was poor, and often contradictory, and I give his testimony little weight.

[31] As alleged in paragraph 6(b) of the complaint

[32] Very little background information is contained in the record regarding Walker because, curiously, he was not asked to provide any during his testimony. Accordingly, much of the information about Walker came from others.

[33] Initially, Walker did not seem to know for which side he had been an observer during the election, but eventually testified that he had volunteered to be an observer because they asked for volunteers during a meeting at the union hall (Tr. 577–578).

installation of new equipment); and seasonal volume.[34] Following the busy summer season, Respondent typically experiences a reduction in demand (i.e., pounds of laundry handled), and in the fall of 2016, such reduced volume called for either lay-offs or in a reduction of hours of work of engineers. In the fall of 2016, Respondent, after consulting with its engineering department employees—who expressed a preference for having their hours reduced—Respondent opted for reduced hours. Nonetheless, M Martin further testified-- in very general terms-- that by December 2016, "no one" was happy with such an arrangement and that there were gripes, and therefore Respondent decided to lay off Walker rather than reduce hours. When pressed to specifically name which engineers had complained about the reduced hours, however, M Martin could only name one—Joe Tuttle (Tr. 90–91; 209–212).[35]

(c) Servin

Servin was Respondent's most senior engineer, having been the first one hired when Respondent commenced operations in mid-2011. He testified that he became an active and visible supporter of the Union by wearing a union button on the day of the election, displaying union stickers on his tool box, and wearing a pocket protector with the union logo. Chief engineer Sharron admitted knowing that Servin was a union supporter, and as discussed further below in connection with a separate issue, the Union requested Respondent to grant Servin time off without pay so he could be part of the Union's bargaining committee during collective bargaining negotiations, a request that was denied (Tr. 95–96; 189–190; 432; 527; 536–537).

Until about mid-February, Servin worked 4 days per week in the day shift during weekdays, and would be off work 3 days a week including weekends. Following Arellano's discharge and Walker's lay-off, things became a lot busier and hectic, and his schedule was changed so that he would have to work Saturdays. During the weeks that followed, and until he was discharged, he missed work on only two Saturdays due to his or family members' health problems (Tr. 371–372; 548).

It is undisputed that Respondent discharged Servin on May 2. According to M Martin, he made the ultimate decision to discharge Servin, although the termination form given to Servin was filled out and signed by Marsh.[36] In that regard, M Martin testified that although he "did not like" what Marsh had written in the termination form as far as the reason(s) for Servin's termination, he did not modify or change the form. He explained that Marsh had not fully explained the reasons, which included multiple "no shows/no calls," meaning that Servin failed

[34] As will be discussed further below, however, M Martin later testified that Respondent's in-house engineers do not get involved in capital projects, since these projects are handled by engineers employed by an outside contractor (AJ Industries) (Tr. 183).

[35] M Martin had advised the Union by email on February 10 that it planned to lay-off two additional employees, engineer Jaime Valdominos and utility engineer Leonardo Porter, in addition to Walker (GCX 24(b). These two individuals, however, were not laid off. M Martin had also advised the Union that Respondent would be shutting down the "graveyard" shift where Walker had been assigned, but that never came to be either, and explanation was proffered in the record as to why these action were not taken.

[36] The Termination Form generated by Respondent and given to Servin has boxes checked that indicate "Violation of Company Policy;" "Poor Attendance/Absenteeism;" "Performance Below Standards;" and "Other," with "Solicitation/ Distribution" written in. Additionally, a box indicating that Servin was given "written or verbal warnings" is also checked. In the space for Notes/Details, Marsh wrote: "Short Notice call off of scheduled work day. Use of personal communication device in violation of company policies." (GCX-18)

to show up to work and did not call. He added that he had been receiving complaints from other engineers about Servin, specifically from Joe Tuttle and Jesus (Chewy) Martinez, although he did not specify the nature of their complaints, and admitted these were not documented anywhere.[37] M Martin also testified that Servin's attitude had changed around February, and that he was "cavalier" and did not wish to work on Saturdays. He added that he was not sure what the reference in the termination form regarding the "use of personal communication device" was about, and explained that the reference to "Solicitation" had to do with Servin having been observed handing out union buttons.[38] The main problem with Servin, he testified, was his attendance, that he "stopped coming to work," and did not call in sick when absent—or that the reasons given for his absence were "false."[39] For example, he said he was going to the doctor when in fact he did not go. All of this, M Martin testified, had been building for some time, and the combination of things, including his attitude and "insubordination" (which was not listed on the termination form, or explained), was "the last straw." (Tr. 105–112; 119; 121–125; 127N129; 139–141)

Director of Engineering Marsh also testified about the reasons for Servin's discharge, which he documented in the termination form he filled out and signed.[40] Contrary to M Martin, he testified that CEO Joe Dramise made the decision to discharge Servin, which Dramise transmitted to M Martin, who in turn transmitted the decision to him. Marsh filled out the termination form based on "everything that could be brought together" about Servin, based on conversations with M Martin, Sharron, and the HR department, which he summarized in the form. According to Marsh, there were two reasons for Servin's discharge, namely "short notice call-off of scheduled work days," and "use of personal communication device in violation of company policy." Asked to explain the first reason, he testified that Servin would call "within a few hours of his starting time" to report that he would not be coming to work "which doesn't help us covering his shift." He explained that while employees don't get fired for doing this, they get "talked to."[41] Marsh admitted that he had never spoken to Servin about this, but believed Sharron had. The second reason for Servin's termination, Marsh testified, had to do with his use of the cell phone. Marsh testified that after the April 4 incident, in which Servin was almost discharged after taking photos of the temperature of the sheets and texting the photos

[37] These alleged statements by Tuttle and Martinez are technically hearsay, and although no objections were raised, I give such evidence little weight. In that regard, I note that neither of them testified, even though they were both employed by Respondent at the time. Moreover, no rationale was provided as to why Respondent would accord more weight to the opinion of these two individuals than those of the many other engineers who apparently did not complain.

[38] M Martin testified that sometime after the election, on a date unknown, he observed Servin on the security cameras monitors passing out union buttons, and he notified Marsh about it. He admitted, however, that Servin was never warned or disciplined for this conduct. Moreover, M Martin admitted than on many occasions employees have solicited others and sold them things like candy bars for fund raisers.

[39] Curiously, however, M Martin admitted he was not sure what the policy was regarding how much advance notice an employee must provide when calling in sick (Tr. 127). I would note that in Section 5.2 of Respondent's Employee Handbook (GCX 2), it states that employees should notify their supervisors as soon as possible, but no later than the start of the workday. As an example of a "false" excuse by Servin for one of his absences, M Martin cited the example of his daughter going into labor, which will be discussed below.

[40] Notably, Marsh testified that he and chief engineer Gene Sharron were equal in their authority, and that he had the authority to discipline, grant time off, assign work, make schedule changes and the like (Tr.290–291; 296–298)

[41] Marsh testified that it was improper to call within a few hours before the start of a shift—even though this practice appears to be consistent with, and allowed under, Section 5.2 of the employee handbook.

to Marsh, he was told never to use his cell phone again during working time—for any reason. Marsh testified Servin never texted him again after this occasion, and that he never personally saw Serving using his cell phone again but that he saw Servin using his cell phone-apparently texting—in a security camera video that was brought to his attention. Marsh added Servin was also seen in a video handing out union buttons or other union paraphernalia, although it is not clear if it was on the same video.[42] This is why, Marsh explained, he provided the reasons he did in the termination form. (Tr. 292–302; 304–315; 322; 325–334)

Chief engineer Gene Sharron, who was Servin's immediate supervisor, testified that Servin had a long-time practice of using his cell phone, during work, to text him photos of broken equipment and other work-related problems, a practice that Sharron deemed useful.[43] This practice continues to the present (presumably by other employees, since Servin was terminated), and he has never been instructed by his superiors to have employees discontinue this practice.

Sharron testified that he was involved in Servin's termination. In that regard, by way of background, he said that after February, Servin became "reclusive" and "clammed up," and that he had trouble completing his jobs.[44] He said he had trouble with Servin's attendance, in particular with two incidents where he did not think Servin had complied with the company's "call-off" policy regarding providing notice before missing work.[45] Sharron explained Respondent's policy regarding such "call-offs," testifying that employees are expected to call in sick a reasonable time before the start of the shift, in order to provide him the opportunity to find a replacement. He defined "reasonable" as 12 hours prior to the start of a shift, but admitted that he usually accepts calls up to 1 hour before the start. With regard to the two incidents where Servin allegedly violated Respondent's policy, the first one involved Servin's daughter giving birth. On that occasion, according to Sharron, Servin texted him on a Friday to inform him that his daughter was going into labor, and he would therefore not be there the next day.[46] Sometime on Saturday, he and Servin spoke on the phone, and Servin informed him that it had been a false alarm, that his daughter had not given birth after all. Servin had provided notice over 11 hours before the beginning of his 8 a.m. shift, so Sharron admitted that initially he did not think the

[42] Notably, Marsh admitted that other employees that may have been observed in the security videos using their cell phones were not talked to or disciplined (Tr. 322), and also admitted that other employees that may have been observed distributing items other than Union materials would not be disciplined, because such conduct would not be "held in the same weight" (Tr. 333).

[43] Sharron testified that as chief engineer he had the authority to discipline, schedule employees, including the granting of over-time, and to assign them work. (Tr. 361–363)

[44] I believe it is worth noting the events that were occurring at the time, in order to provide some context regarding Servin's alleged change in attitude. In early February, the engineers voted in favor of being represented by the Union. Within 1 week of that event, two of the Union's supporters, Arellano and Walker, had been terminated, which as Sharron admitted caused a shortage in manpower that forced him to juggle engineers' schedules—and presumably increased their workloads, as testified by Servin. Servin's schedule went from 4 days a week with weekends off, to 5 days a week with work on Saturdays. Servin testified that had been promised, as the most senior engineer, that he would not have to work on weekends. (Tr. 373–374; 377; 532)

[45] Sharron repeated an allegation, also testified to by M Martin and Marsh, that during the period from February to early May, Servin missed work about half of the dozen or so Saturdays he was scheduled to work. Servin testified that he only missed two of those Saturdays, as will be discussed below. No payroll evidence was introduced in the record to support the allegation that Servin missed work on half a dozen Saturdays, as claimed. (Tr. 376–377; 548)

[46] The text shows it was sent on Friday April 21 at 9:22 p.m. and states: "My daughter just went into labor on my way to hospital to grab my grandson it's gonna be a long night I won't be making it in the morning" (GCX 10)

notice had been improper. Apparently on the following Monday, after Sharron thought about it some more, he came to the conclusion that Servin's absence was part of what he believed to be a pattern of Saturday absences, and therefore came to the conclusion that Servin's notice had been improper. He testified he had assumed that Servin had spent Friday night at the hospital, but as it turned out, Servin stayed at home to watch his grandson, while his wife went to the hospital to attend to their daughter.[47] Sharron therefore came to believe that Servin should have come to work on Saturday, and therefore the absence was not an excusable one.[48] According to Sharron, he spoke for almost an hour with Servin on Monday about this incident, and summarized the hour long discussion by testifying that Servin simply did not want to work Saturdays, because he never had to.

The next incident that involved an "improper" call-off, according to Sharron, occurred the following week. On Thursday, April 27 at 5:43 a.m., Servin sent Sharron a text with the following message: "My ear is killing me didn't sleep last night headed to my doctors this morning at 8:30am don't know when they will be able to see me will be in asap."[49] At 8:54 a.m., Servin sent a follow-up text with the following message: "I'm not gonna make it today or will bring a note from my doctors." At 2:46 p.m., Servin again sent Sharron another text as follows: "Doctor putting me off till Tuesday will bring my note when I come in." The next day, on Friday April 28 at 8:39 a.m., Sharron sent Servin the following text message: 'Where are you your supposed to be here." At 9:18 a.m., Servin texted the following response; "Doctor has me off till Tuesday morning." Three minutes later, at 9:21 a.m., Sharron responded: "That's not how I read it." A few minutes later Servin replied: "Sorry for the miss understanding blame it on all the meds I'm on lol." Sharron testified that he had interpreted the message sent Friday that "the doctor is putting me off until Tuesday…" to mean that the doctor would not be able to see Servin until Tuesday, and accordingly he was expected to be at work the next day, on Friday (4/28), hence his text messages to Servin on Friday morning. Yet, he admitted that when Servin came in on Tuesday, May 2, bearing a doctor's note dated April 27 stating that he had been ill and had been excused from work until May 2, the note corrected his "misunderstanding" of the incident. Nonetheless, Sharron testified that he still believed the "call-off" by Servin was improper because it was reported to him by two employees (Tuttle and Martinez), that Servin had attended a union meeting on the afternoon of Friday, April 28. Sharron testified that Servin's alleged attendance at the union meeting made this call-off (and, presumably, the doctor's excuse) improper. As indicated above, Respondent discharged Servin that same day, Tuesday May 2 (Tr. 373–390; GCX 10; 36(a)-(c)).

Credibility Resolutions

First, some general principles that I have used in assessing witnesses' credibility. In assessing credibility, I must look to a number of factors, including but not necessarily limited to, inherent interests and demeanor of witnesses, corroboration of testimony and consistency with

[47] Yet, Servin's text stated that he was on his way to the hospital to pick up his grandson, which implies that he was going to be taking care of him Friday night while his daughter was in the hospital. Contrary to what M Martin suggested in his testimony, Servin did not provide a "false" reason for his Saturday absence.

[48] Yet, Sharron admitted never telling Servin that this "call-off" had been improper or warning him not to do this again. (Tr. 382)

[49] Sharron confirmed that Servin had a history of chronic ear infection(s), for which he had previously sent Servin home because of extreme pain/discomfort. (Tr. 383)

admitted or established facts, inherent probabilities, and reasonable inferences that may be drawn from a record as a whole. *Hill & Dales General Hospital*, 360 NLRB 611, 615 (2014); *Daikishi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed Appx. 516 (D.C. Cir. 2003). Moreover, in making credibility resolutions, it is well established that the trier if fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2 Cir. 1950).

First, I note that I found the testimony of Arellano, Servin and Walker to be straightforward and reliable, with few if any contradictions or inherently untrustworthy assertions. They appeared to be striving to be candid, even admitting certain things that might tend to be detrimental to their interests. This is particularly true of Arellano and Servin, whose testimony was far more detailed and extensive that Walker, whose testimony was brief—and not subject to cross examination, probably because there was little to cross-examine him about. Arellano, for example, admitted telling Hernandez to report her apparent injury as having occurred at work—something he apparently believed at the time (because, as discussed infra, he had good reason to). He also admitted that when M Martin gave him a piece of paper and pen to write a statement at their meeting, in his mind he already had been terminated—an admission that may be prejudicial to his asserted *Weingarten* rights. Likewise, Servin admitted being exasperated by his new schedule that required him to work Saturdays, which he had never had to do, and admitted having difficulty completing jobs on time after his workload increased in the wake of Arellano's and Walker's termination, something that might support the asserted reasons for his dismissal.

On the other hand, I found the testimony of M Martin, Marsh and Sharron to be contradictory of each other's, and not reliable for a variety of reasons. Marsh, in particular, appeared uncomfortable, and struck me as being cagey, appearing to be attempting not to admit or acknowledge anything that might be prejudicial to Respondent. He frequently responded with phrases like "I don't recall," or "it's possible," in an obvious attempt not to be pinned down. For his part, M Martin was plainly contradictory at times. For example, he initially testified that he made the decision to terminate Servin (Tr. 106), then several weeks later, when his testimony resumed, testified that he did not play a "large part" is Servin's termination, instead suggesting that Marsh was the principal actor, who came up with the reasons. He then suggested it was a "team" decision between him, Marsh and Sharron (Tr. 139). M Martin also repeatedly employed the term "insubordination," among others, to describe the alleged misconduct that justified the discharge of Arellano and Servin, when the record is devoid of any evidence of insubordination on their part. He also testified that Servin had provided "false" excuses for his absences, asserting that Servin had said he was going to the doctor but in fact did not go—something which the record shows is simply inaccurate. Marsh, on the other hand, testified that it was Dramise who issued the directive to discharge Servin (Tr. 317), and insisted that Servin's use of his cell phone was one of the main reasons he was discharged, testimony that was contradicted by M Martin and Sharron. Indeed, M Martin testified that he disapproved of the termination language notice making reference to Servin's use of his cell phone, and Sharron testified that he had no problem with his practice of texting photos of defective or problematic items inside the plant. Of the 3, Sharron struck me as the one who was the most candid, but his explanation as to why Servin's advance "call-offs" were defective or not acceptable strained credulity and were unconvincing.

In view of the above, I credit the testimony of Arellano, Servin and Walker over the testimony of M Martin, Marsh or Sharron, to the extent there is conflict—which in many instances is not the case. Indeed, as more thoroughly discussed below, the shifting and contradictory rationales by Respondent for the termination of the 3 employees, independent of credibility, is a strong indication of pretext.

7. The Union's request for information

The complaint alleges that the Union requested certain information from Respondent on 3 separate occasions, on February 6, February 13 and February 18.[50] There is no true dispute that the Union requested the items listed in the complaint, which was done via emails, but rather the dispute centers on whether Respondent provided the information requested, whether the information existed or was in Respondent's possession, or whether the Union was legally entitled to the requested information.[51] Thus, on February 6, via email, the Union requested, inter alia, the following information:

(1) A list of current bargaining unit employees including their…date of completion of any probationary period.
(2) Copies of all manuals, training materials, documentation, memoranda, communications and policies related to the operation of any work distribution system currently in use.
(3) A list of employees who have had schedule changes, including dates and job classifications at time of schedule changes.
(4) A copy of all policies or procedures with respect to employment of employees.

On February 13, via email, the Union requested, inter alia, the following information:

(5) A copy of all training records for Mr. Arellano.
(6) A copy of Mr. Arellano's employee evaluations.
(7) Copies of all evidence, written statements, video/audio recordings used to determine to terminate Mr. Arellano's employment.

On February 18, via email, the Union requested, inter alia, the following information:

(8) Information responsive to the question of what was behind Respondent's decision to lay-off employees and change employees' schedules.
(9) Evidence to support the claim that business need requires layoffs/schedule changes.

[50] Complaint paragraphs7(d), 7(e) and 7(f), each with subparagraphs listing the requested information.
[51] In its answer, Respondent does not dispute that the information described in the complaint was requested, but appears to object on the basis that the language describing the information sought is not complete or fully accurate, thus asserting repeatedly the information sought (via emails) "speaks for itself." The General Counsel, however, did not plead the entire list of requested items verbatim, apparently because Respondent did provide some of the information sought or because such information or materials did not exist, so in its pleadings General Counsel only listed the information that it alleges was unlawfully withheld. Accordingly, I will only describe, and address, the items alleged in the complaint, as described below..

(10) Copies of all outside contractor's invoices for maintaining/installing/servicing laundry equipment in the plant for the past 5 years. [52]

It is important to note the circumstances underlying these information requests. Shortly after the Union prevailed on the February 6 election, M Martin notified the Union, via email to E Martin, that Respondent planned to change the work schedules of its engineering department employees, and planned to discharge Arellano and lay off Walker. In his email, M Martin informed the Union that Respondent's operational needs necessitated these urgent schedule changes, which he suggested had been held in abeyance pending the election, and requested to meet within the next couple of days to negotiate about these changes, as well as the termination of Arellano. Over the course of the following days, as the situation evolved, the Union responded, via emails from E Martin to M Martin, that it needed the information requested so that it could properly negotiate about these issues (GCX 21; 22; 23).

Item 1, above ("A list of current bargaining unit employees including their…date of completion of any probationary period"), was requested by the Union on February 6. M Martin testified that Respondent's employees have a probationary period, but that Respondent does not record—or apparently keep track of—when such probationary periods end. Apparently, however, Respondent did not inform the Union that it does not record this information, simply remaining silent and not responding to this request. Respondent, however, did provide the Union with a copy of the engineering department employee census, via email on February 10 (Tr. 146–147; 254; 418; GCX 23–24).

Item 2, above ("Copies of all manuals, training materials, documentation, memoranda, communications and policies related to the operation of any work distribution system currently in use."), was requested by the Union on February 6. In response to the Union request for manuals, Respondent asserted, via email, that these were too voluminous to provide, but never offered an alternative means of viewing or summarizing the information sought.[53] The only item Respondent provided in response to this request was a copy of the Employee Handbook (GCX 2; 24(a); Tr. 147-; 254; 418). With regard to the Union's request for training materials, M Martin initially testified that Respondent did not keep good training records, then in apparent contradiction testified that it kept no such records, and so informed the Union. M Martin testified that he informed the Union Respondent did not keep those records based on information he received from Marsh and Sharron that such records were not kept. Since informing the Union of that fact, however, M Martin admitted that Respondent has discovered a number of these training records but, notably, has failed to inform the Union of such discovery, or turned these records over to them (Tr. 152–153; 217–220). [54] This response, or lack thereof, is apparently

[52] I have listed the Union's information requests at issue in numerical order (1-10) for ease of referral when I discuss these requests below.

[53] The Union apparently never demanded access to Respondent's facility for the specific purpose of reviewing these manuals, but did request access for the purpose of viewing the break room used by the engineers, which was closed by Respondent after the election, access which was denied, as discussed below.

[54] M Martin's rationale for not revealing to the Union that Respondent had later found training records—after telling the Union these records did not exist—was that since the Union had not repeated its request, he assumed they were no longer interested (Tr. 154–155). I find this explanation to be disingenuous at best, and one that in my view further strains M Martin's credibility.

also applicable to Item 5 ("A copy of all training records for Mr. Arellano.") requested by the Union in the wake of Arellano's discharge (Tr.416–417; 421).

Item 3 ("A list of employees who have had schedule changes, including dates and job classifications at time of schedule changes.") was requested by the Union on February 6. With regard to this request, M Martin testified that Respondent had no "written policies" in place regarding schedule changes, rather asserting that Respondent's "practice" was to allow employees to bid for shifts in accordance to seniority. Nonetheless, on February 10, via email, M Martin sent the Union a number of documents that appears to be responsive to this request, including the current and proposed engineering schedules as well as the time records (or time card records) of all engineering department employees going back several years, records which amounted to a total of about 1300 pages, and from which any schedule changes were difficult—if not impossible—to discern (RX 14; 174–175; 271; 418).[55] It appears, however, that Respondent complied with this request—and the General Counsel did not meet its burden to establish that Respondent did not comply.

Item 4 ("A copy of all policies or procedures with respect to employment of employees.") was requested by the Union on February 6. In response to this request, Respondent only provided the Union with a copy of its employee handbook (GCX 2), even though the handbook makes reference to other separate documents, which M Martin admitted were in Respondent's possession, such as benefits. M Martin testified that he did not recall whether he had provided the Union with these separate documents, but E Martin testified that Respondent had not (Tr.147–150; 418–419) I therefore conclude that Respondent did not provide the document(s).

Items 6 ("A copy of Mr. Arellano's employee evaluations") and 7 ("Copies of all evidence, written statements, video/audio recordings used to determine to terminate Mr. Arellano's employment"), which were requested by the Union on February 13, were not provided by Respondent to the Union, according to the testimony of E Martin. M Martin, after initially hedging in response to questions as to whether these documents had been provided, finally admitted he did not know. He admitted, however, not providing the Union with a copy of Hernandez's statement regarding Arellano's conversation with her which led to his discharge. E Martin also testified that Respondent had not provided the Union with a copy of the video of Arellano and Hernandez interacting with one another on the day in question, or otherwise allowed the Union to view it, a video that M Martin admitted he had watched prior to discharging Arellano. Likewise, E Martin testified, without contradiction, that Respondent did not provide the Union with Arellano's evaluation(s) or any other of the requested documents related to his discharge (Tr. 156–157; 417; 422). I accordingly conclude that Respondent did not provide the Union with the above-described information.

[55] The contents of the numerous emails that were exchanged during these periods between M Martin and E Martin, which contained some of the information requested by the Union, will be discussed in more detail below, in section 9 ("The changing of employee work schedules"), emails which were placed into evidence by the General Counsel. Unfortunately, as discussed below, these exchanges, which contain a treasure trove of information about the parties' approach and attitude toward the information requested and about bargaining, were largely ignored during testimony by both sides, but particularly by the proponent of these documents, the General Counsel.

Items 8 ("Information responsive to the question of what was behind Respondent's decision to lay-off employees and change employees' schedules"), 9 ("Evidence to support the claim that business need requires layoffs/schedule changes") and 10 ("Copies of all outside contractor's invoices for maintaining/installing/servicing laundry equipment in the plant for the past 5 years") were requested by the Union on February 18. According to the uncontroverted testimony of E Martin, Respondent did not provide the Union with any information or documents with regard to its justification or need for the lay-off(s) or schedule changes, nor provided the Union with any copies of or information about the contractor invoices requested (Tr. 421–424).[56] In light of the above, I conclude that Respondent did not provide the Union with the information described above.

8. The closure of the engineer's break room

Paragraph 6 (f) of the (amended) complaint alleges that about February 7, Respondent closed the engineers "lunchroom" in retaliation for its employees' union activities, and paragraph 7(i) alleges that it did so without notifying or bargaining with the Union. Although Respondent specifically denied these allegations as pled, the following facts are not in dispute:

- For a number of years the engineering department employees took their breaks (including meals) in a small break room in a separate part of the plant, which was primarily, if not exclusively, used by these employees, and where they kept their own equipment such as a coffeemaker and microwave oven;[57]
- This break room was closed/changed on February 7, with emails exchanged between the Union and Employer about such change on this date;[58]
- Respondent did not notify or negotiate with the Union prior to closing the break room;
- At some point after it was closed, the break room was remodeled and turned into a parts room, with shelves and manuals.

In dispute is whether the closure of the break room had long been planned and announced as part of a remodeling of the plant, a remodeling that included a new large break room intended by Respondent to be used by all employees, including the engineers, and thus whether Respondent was obligated to bargain with the Union before it closed the break room.[59]

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[56] As will be discussed below in connection with a separate allegation of the complaint, there is no dispute that Respondent has regularly, and for years, used an independent contractor named AJ Industries to perform certain engineering tasks at Respondent's facility.

[57] The break room already had a refrigerator and sink, as well as tables and chairs which were provided by Dramise. It is not clear whether this break room was ever officially or formally designated by Respondent as the "engineers break room," but is not disputed that this room was or became the de facto engineer's break room by custom or practice. Other than engineers, no other employees used this break room except drivers who would occasionally use it.

[58] E mails between the Union and Respondent dated February 7 discuss the closing/ changing of the break room, which clearly indicates that's when the change occurred (GCX 27(a)-(c), as corroborated by the testimony of Arellano and Servin. "Before" and "after" photos of the break room were introduced, with the earlier photo (GCX 29(a)& (b)) showing what the break room looked like before the change, and a photo of it later (GCX 39(a) &(b)), showing an empty room. As discussed below, this space was later turned into a "parts" room with shelves.

[59] In order to avoid confusion, this newly built break/lunch room, which by all accounts was finished in late 2016 or by January 2017, will be called the "lunch room."

Arellano testified that sometime around 2012, after a prior tenant had vacated that part of the building, Sharron told the engineers that they could use that room—which already had a refrigerator and sink—as their break room. Engineers took breaks in this break room, where they had privacy and could avoid being called to the floor to do a job during their breaks. Arellano had his own microwave and coffee maker there, and Servin had placed a toaster oven there, and there were tables and chairs. On February 7, there was a notice on the chalkboard informing the engineers that the break room was closed. According to Arellano, he was never notified before February 7 that there were plans to close this break room.[60] He also testified that Respondent had opened a new break room/ lunch room for employees sometime in January (Tr. 510–516; GCX 29(a)(b)). Servin testified that the day after the election, which would be February 7, the tables and chairs were removed from the break room, and a message on the board informed the engineers that they should use the (new) lunch room. According to Servin, only engineers, and on occasion the drivers, would use the break room, which he and the other engineers preferred because it was located in a remote part of the plant where they would not be bothered. Photos taken by Servin about 2 months after the election (GCX 39(a) & (b)) showed an empty room, without the cabinets, refrigerator and sink that were present on the February 7 photos (GCX 29 (a) & (b)), but by the time he was discharged in early May, shelves and manuals had been placed there (Tr. 555–559).

M Martin testified that the closure of the break room had been planned for some time, as part of the expansion that had resulted in the building of the new lunch room, as the February 7 exchange of emails with the Union (GCX 27) describe. He also attempted to email the Union the plans (or blueprints) of the expansion plan, which apparently showed the long- planned elimination of the break room, with the file was too large to email (GCX 28)[61] He further testified that it had been "common knowledge" for a while that the engineers break room would be eliminated, and that such plans had been orally communicated to the engineers by the chief engineer(s), but admitted no written notices had been posted or distributed. The plan had been to turn the break room into a parts room, since that room was located in the parts area of the facility. Although the new lunch room was finished and ready to use in late 2016, the reason they waited until February to close the engineers break room is that they had not received the shelves and other parts needed for the conversion, which arrived in early February. Additionally, M Martin testified, they were concerned about doing it just prior to the election, because of the impact that might have on the proceedings. During M Martin's testimony, emails between him and Marsh were introduced as an exhibit, in which M Martin asks Marsh, on February 8, if he has any documentation showing that the closure of the break room had been discussed before the advent of the Union's petition. After some delay, Marsh attached handwritten notes of a meeting dated January 11, in which the subject of the closure of the break room was apparently discussed

[60] I would note, however, that E Martin admitted that he had been informed by some of the employees that they had been informed, prior to the advent of the Union, that this room was going to be "remodeled" at some point, if not closed. (Tr. 428–429)

[61] The February 10 email described how the plans were posted on the wall of the facility in 2016 showing the intention to consolidate the then-existing break rooms/lunch rooms into a the large lunch room that was finished in late 2016. The email also makes reference to a visit to the facility the by E Martin with fellow Union Representative Jose Soto the day before (February 9), during which they were shown the new lunch room and the old engineers break room that had been closed (GCX 28)

(GCX38(a)-(c)); Tr. 157–173).[62] Marsh testified about the break room very briefly, stating that as of February 7, the break room was "transitioned" for another purpose, as had been planned since at least early January, and possibly before, in light of the construction of the new lunch room, as a result of which the break room was no longer needed. Marsh further testified that he believed the break room was converted into new use in February or March, some 3 months after the employees had been informed about it (Tr. 335–336). Dramise testified that Respondent had planned a large expansion of its facility since 2011, but did not have funding until 2015, at which point the expansion project began. As part of this expansion, a large single employee lunchroom was built, which eliminated the need for several "temporary" break rooms that had been in existence, including the engineers break room. Sometime in February, Dramise testified, the conversion of the engineers break room into a parts room began, as had been planned (Tr. 350–353).

Finally, photographs and uncontroverted testimony show the new lunchroom to be about 5 thousand square feet, with TV monitors, lockers, vending machines and other amenities, and was built at a cost of about $900,000, according to M Martin. As in other parts of the facility, there are security cameras in the new lunchroom, which Servin testified was one of the reasons engineers did not want to use it, since their union activity might be observed.

In light of the above-discussed evidence, and taking into account inherent probabilities and the credibility of the witnesses, I am persuaded that the evidence supports an inference that Respondent had planned to *eventually* close the engineer's break room. In reaching this conclusion, I credit the testimony of M Martin, Marsh and Dramise in that regard, and note that E Martin admitted he had been informed by employees that Respondent had informed them the room would eventually be remodeled. I also note that Respondent had embarked on an expansion plan which included building a large employee lunchroom, which opened in late 2016, and the closure of the smaller break rooms that had existed up to that point that were used by *rank and file* employees.[63] Based on all of these factors, I believe it reasonable to conclude, as stated above, that Respondent would have *eventually* closed the engineer's break room. I have twice used the word *eventually* in a deliberate manner, because while I am persuaded that Respondent had planned to close the engineer's break room, I am not persuaded that it had planned to close it, as it did, on February 7, the day after the election. The timing and abrupt manner in which the break room was closed, with no advance notice to the engineers to remove their personal appliances in the room—such as toaster ovens, microwave ovens, and coffee makers—strongly suggests that it was a hasty decision intended to send a signal that Respondent wasn't pleased about the election results and that there was a price to be paid for supporting the Union.[64] In so concluding, I note that photos introduced in the record indicate that this space sat

[62] The attached handwritten notes by Marsh are cryptic. Under a heading of "Project Meeting 1/11/17" there are hand written notes that touch upon several topics, not relevant here. One of the entries, however, states "lunch room—remove." It is not clear who was present at this meeting, or what the cryptic entries signify, and Marsh did not testify about it.

[63] I used the term *rank and file* deliberately, because the General Counsel points out that a small break room in the office area of the dry cleaning department was apparently left untouched, as depicted by a photo introduced in the record (GCX 30). This office, however, was used by *managers and supervisors*, not rank and file employees.

[64] As described earlier, engineers went to the break room on February 7 and found that the tables and chairs, which belonged to Dramise, had been removed, and a notice in the board informing them that it was closed and to use the new lunchroom.

empty and unused for the next 2 to 3 months, even though Respondent's witnesses testified that they had received the shelves and other items it had intended to install there to turn that space into a parts room. I sum, these circumstances persuade me that Respondent's decision to close the break room precisely on February 7 was reached in very short order and had a retaliatory motive.

9. The changing of employee work schedules

The complaint alleges that about February 18, April 7, and July 5, Respondent changed bargaining unit employee work schedules, allegations that Respondent essentially admits in its answer, and which the evidence supports.[65] In dispute is whether Respondent implemented these changes without notifying and bargaining with the Union.

With regard to the schedule change that occurred about February 18, the General Counsel, in his post hearing brief, generally refers to the exchanges of emails between the parties that occurred prior to this change, without discussing the specifics of such communications, and generally asserts that Respondent did not bargain with the Union about this change.[66] A close reading of the numerous emails that were exchanged between the parties during this period, however, reveals the story to be far more complicated than implied by the General Counsel's bare assertions.

On February 6, presumably after the results of the election were in, E Martin handed M Martin a list of information requests it needed for bargaining purposes.[67] On Tuesday, February 7, M Martin sent E Martin an email stating that Respondent wants to make a "schedule change and layoff," and requests to meet for the Union's "bargaining input" before Friday (February 10). On February 8, at 1:15 p.m., E Martin responds via email, requesting that Respondent should provide a list of 13 items before meeting to discuss layoffs or schedule changes. The list is very similar to the list that had been submitted to Respondent on February 6, with some modifications. M Martin responds at 1:43 p.m., protesting that the list is an "incredible" list to try to put together before a meeting "tomorrow," adding that Respondent would be happy to meet these items, but cannot dedicate all its resources to accommodate the Union's "agenda." At 2:08 p.m., E Martin responds, indicating that the Union would be happy to meet to discuss these issues, but cannot "conclude any negotiations" without the requested information, and suggests that their meeting be postponed until the information is provided. At

[65] Complaint paragraphs 7(j),7(l), and 7(m). In its answer, Respondent admits that such changes occurred and were implemented on February 15, April 8, and July 5.

[66] In essence, the General Counsel appears to adopt the position that the numerous emails contained in exhibits GCX 22, 23, 24 and 25 "speak for themselves" and therefore there is no need to discuss or dissect their significance. I beg to differ. While the emails may speak for themselves, their language may be heard and interpreted differently depending on the listener. Then again, Respondent did not much discuss these exchanges either, which I believe to be an error on both sides.

[67] This list of 13 items, as E Martin testified, was a "generic" information request that the Union typically requests from employers in order to start the collective bargaining process. Indeed, its "cut and paste" nature is illustrated by the fact that item 13 asks for copies of all collective bargaining contracts in effect between "Cosmopolitan Las Vegas" (sic), obviously the wrong employer, and any other union (GCX 21(a) & (b). I would note than in a follow-up email dated February 8, M Martin informs E Martin, rather disingenuously, that given the reference to the Cosmopolitan in the last item, Respondent assumed that this request was not meant for Respondent, and therefore it was "disregarded" (GCX 22(a).

5:57 p.m. M Martin responds, indicating that Respondent is a 'service" business and needs to react to changes quickly, adding that these proposed changes had been delayed during the organizing campaign, and its need to make the changes in order to "function." He indicates that the information requested cannot be provided in less than 24 hours, but would be working on obtaining it, and adds "if you do not want to bargain over the scheduled changes land layoffs let me know." The email concludes that "delaying tactics that hurt our business will not be acceptable to us," and adding that Respondent wants to come to an agreement quickly. The following morning, on February 9, E Martin replies that the Union was willing to discuss any schedule changes or possible layoffs, but cannot concede to agree to anything without due diligence—and that without the requested information, and the time to review it, it "could not commit to an agreement." The email also adds that the Union was willing to come to "an agreement" quickly and in that interest it had provided three dates for "contract negotiations."[68] Finally, the email confirms their meeting that afternoon at 4:30 p.m. to discuss the schedule changes and layoffs, as well as the break room issue. M Martin responded that he would be at the meeting. (GCX 22; 23)

The parties apparently met later that day, on February 9, as can be discerned from communications that followed, although there is surprisingly little—if any—testimony as to what occurred at this meeting, which apparently lasted nearly 4 hours, as described by M Martin in a later email.[69] On February 10 at 10:10 a.m., M Martin emailed E Martin, informing him that Respondent was gathering the information requested, and attaching the current and *proposed* schedules, with explanations as to what is prompting the changes and how layoffs have occurred in the past, and a list of employees affected, including Arellano (who Respondent explains is being discharged, and the reasons therefor), Walker, and other named employees.[70] The email also indicates that the only manner in which past schedule changes, which Respondent did not keep track of, can be ascertained is by looking at timecards.[71] Finally, in the email M Martin requests input from the Union before the end of the day Monday (February 13), so that the employer can start preparing for the proposed scheduled changes slated for February 18. It also requests the Union to inform Respondent what else it needed. At 1:28 p.m., E Martin responded that the Union would be reviewing the provided information but was also waiting to receive "the full list we have asked for" (presumably referring to the list of 13 items previously discussed), adding that it would respond in a timely manner as soon as possible. (GCX 23; 24)

The Union did not respond by the end of the day Monday, February 13, as requested, to M Martin's question about what additional information it needed regarding the proposed

[68] I would note that at this point the parties appear to be talking at cross-purposes, with Respondent wanting to negotiate about the schedule changes/layoffs, while the Union appears to be beginning to focus on negotiations for a collective-bargaining agreement.

[69] In his post hearing brief the General Counsel indicates this meeting occurred on February 10, which is plainly incorrect, and is indicative of the casual manner this particular issue was handled—by both sides, but particularly by the General Counsel, who bears the overall burden of proof. Indeed, the only testimony as to what may have happened at this meeting came from M Martin, who simply stated that the parties "weren't getting anywhere," although that might also be a summation of the over-all negotiations about the proposed schedule change.

[70] The email also indicates that Arellano's discharge was discussed during the meeting on February 9, among other topics.

[71] The Union admitted that Respondent produced the timecards (RX 14), although it is not clear when, and that it could not discern how schedule changes were made in the past based on those cards.

schedule changes and layoffs. Instead, 5 days later, on Friday February 17, at 4:21 p.m., E Martin emailed M Martin stating that the Union "has been informed that Apex Linen is proposing changes to the bargaining unit member's work schedules," and demanding that Respondent do not implement the new schedule until they have had an opportunity to bargain over—and agree to—such changes.[72] "Pursuant to that end," the Union then requests Respondent to provide additional information as requested in a list of 7 items specifically described in the email. About 10 minutes later, at 4:32 p.m., M Martin responded via email that he had sent that information the previous Friday, had asked for comments by Monday February 13, and had received no response from the Union. E Martin responded via email at 4:43 p.m., stating "You have previously supplied incomplete information and as I stated in reply we would review and be open to negotiate upon receipt of *all* the information" (emphasis supplied), and repeating the demand for all the information, as well as to provide dates and times for negotiations. (GCX 25)

There are apparently no additional communications for the next several days, until M Martin responds on February 23, asserting that the Union still had no comments or requests regarding scheduling procedures after "hundreds of pages of documents we have sent," and after meeting for "nearly 4 hours" almost 2 weeks earlier, and again requesting input from the Union—and again requesting bargaining.[73] In a separate email (at 3:22 p.m.), M Martin again informs E Martin that Respondent believes that it had provided all the requested information, and asks what else the Union wanted. E Martin responds the following date, on February 24, referring M Martin to the letter provided by the Union on the night of the election, February 6, and also referring to the other emails that requested information about Arellano's and Walker's termination, as well as the closure of the break room.[74] By this time, of course, Respondent had implemented the schedule changes, which apparently went into effect on Saturday February 18.[75] Curiously, once again, the record is almost entirely devoid of evidence as to exactly what schedule changes Respondent made on February 18. The only evidence of a schedule change in the record involves Servin, whose schedule, as discussed in his testimony and that of Sharron, was changed from working 4 days per week to 5 days per week, including Saturdays—which became an issue in his eventual discharge, as previously discussed.[76] Additional emails were

[72] This appears to be disingenuous, since the Union had been informed about the proposed schedule changes some 10 days before by Respondent, who had indicated it wanted to implement the changes by February 18.

[73] The comment about not receiving requests regarding scheduling procedures also appears disingenuous, since the Union had specifically asked for 7 listed items on February 17, late as it was.

[74] This is a good example of how the parties appear to be communicating at cross purposes, or past each other. For about 2 weeks prior, Respondent had communicated its desire to negotiate about the schedule changes it wanted—or needed—to make by February 18, while the Union appears to be insisting that before it engaged in <u>any</u> bargaining, it needed to have <u>all</u> the information it had requested, most of which appears to be general information it needed to negotiate an over-all collective-bargaining agreement, not necessarily about a specific issue such as schedule changes. Nonetheless, it is notable that later that same day, February 24 (at 9:18 a.m.), M Martin, using a list of 24 items that had been listed in an email to him at 8:59 a.m. that day by E Martin, specifically addresses each of the items listed, and claims that most of the information requested had either already been provided on February 10, did not exist, or was not a relevant or factor in the decision-making process. There is no record of a response by E Martin.

[75] By this time Respondent had also discharged Arellano (on February 13), laid-off Walker (on February 15), and closed the engineers break room on February 7, as discussed previously.

[76] In that regard, both Servin and Sharron testified that the schedule change was mandated because Respondent was short-handed in the wake of Arellano's and Walker's termination.

exchanged after the last one described above, but these do not add much to the issue at hand, with the parties essentially pointing fingers at each other, and agreeing to meet for negotiations again on March 6 (GCX 25).[77]

In sum, there were numerous emails exchanged between the parties during the February 6 to February 23 time period regarding bargaining for a collective-bargaining agreement in general, and bargaining about the proposed or intended change in schedule(s), as well as requesting—and providing—information about these topics. There was also at least one lengthy face-to-face meeting between the parties where, apparently, these topics were discussed and information was exchanged, although the record is mostly silent as to what transpired during this meeting. Whether the above-described events amounted to sufficient bargaining, and whether such bargaining reached an impasse regarding the issue of the schedule change(s) will be discussed below.

With regard to the alleged changes in employee schedules that occurred about April 7–8 and July 5, the story is far less complicated. In essence, E Martin testified, and M Martin admitted, that Respondent never notified or bargained with the Union about the April changes, let alone bargain to impasse, assuming there was such legal requirement. Regarding the April schedule change, M Martin testified that he did not recall notifying the Union. He explained that the schedule change was agreed to by two employees, Tuttle and Magtibay, as a "swap" between themselves—a practice that had been common in the past, where the small crew of 8–11 engineers covered for each other and otherwise traded shifts. The two employees simply notified Marsh and Sharron that they had agreed to swap schedules and it was accordingly implemented—without input from the Union. The schedule change in July involved three employees, Martinez, Magtibay, and Virgen. According to M Martin, Martinez and Magtibay agreed to swap schedules, and Virgen was promoted. Sharron brought the proposed changes to M Martin, who approved them. Notably, however, M Martin testified that he met with E Martin regarding proposed scheduled changes in July, and although Respondent and the Union "never fully agreed on anything," they agreed that schedule changes should go according to seniority. This testimony, however, does not address the issue of whether the Union was specifically notified and bargained with regard to the schedule changes involving Martinez, Magtibay and Virgen, which E Martin testified the Union was never notified about. Although M Martin testified he told Tuttle, whom he described as a union official, "like a steward," that these three individuals' schedules had been changed based on their mutual agreement, there is no evidence that the Union ever appointed Tuttle as a "steward" or any other official capacity. Moreover, according to M Martin's version, Tuttle was simply informed after the fact, so even assuming he had some sort of official role in the Union, there is no evidence that the Union was notified or bargained with about the specific schedule changes involving these three individuals (Tr. 180–182; 221–222; 431).

Accordingly, in light of the above-described evidence, I conclude Respondent did not notify or bargain with the Union regarding the July 5 work schedule changes.

[77] On one of the following emails the Union did demand that Respondent rescind the schedule changes, as well as the terminations of Arellano and Walker, as well as the closure of the break room.

10. Bypassing the Union and dealing directly with employees

The complaint alleges that about March 29 and June 21 Respondent by-passed the Union and dealt directly with employees.[78] These allegations are directly related to the schedule changes discussed immediately above, regarding the schedule changes that took place in April and July. It is uncontroverted, as admitted by M Martin in his testimony, that these schedule changes came about after discussions between the employees named above and management. Thus, the record shows that these employees agreed to "swap" or trade schedules, as had been the custom before the advent of the Union, and then went directly to management, who approved the schedule changes. The Union was kept out of the "loop," and was not informed or bargained with about these changes.

11. The change in cell phone policy

The complaint alleges that about April 4, Respondent changed its policy regarding the use of cell phones on the shop floor.[79] This refers to the previously discussed incident on April 4, when Respondent informed Servin during a meeting that he had been observed taking photos with his cell phone, and initially intended to discharge him until it became evident that he was taking photos of the towels and texting the photos to Marsh to document a potential problem with the temperature of the towels. Respondent (through M Martin and Marsh) informed Servin he could no longer use his cell phone on the shop floor—for any reason. This appears to be a departure from previous policy or practice, since there is no evidence of this policy being in place before, and the use of cell phones appears to have been allowed previously. The Union was not notified of this "new policy," although there is no evidence that this policy was applied to anyone other than Servin (Tr. 97; 105; 315–316; 348).[80]

12. The use of third party workers to perform bargaining unit work

The complaint alleges that beginning about February 19, Respondent started using individuals employed by an independent contractor to perform work customarily performed by the engineers in the bargaining unit.[81] The independent contractor in question is AJ Industries (AJI), which is owned by Dramise, one of Respondent's principals. There is no dispute that AJI has been used by Respondent on various projects and jobs since beginning its operations in 2011, and indeed AJI workers appear to have had an almost continuous presence at the facility since then. The gist of the General Counsel's allegation is that beginning in mid-February, the scope or nature of the tasks handled by AJI changed, and it began taking over maintenance or repair duties typically and traditionally handled "in-house" by Respondent's engineers, who were by then represented by the Union.

[78] Complaint paragraphs 7(q) and 7(u)
[79] Complaint paragraph 7(v)
[80] Additionally, I would note that while Section 5.5 of Respondent's employee handbook (GCX 2) prohibits the use of personal communication devices (PCD) to photograph or record, it does not address the use of these devices to make calls, and certainly contains no strict policy against such use. Moreover, as discussed previously, engineers had a practice of taking photos of defective equipment, a practice that was seen as useful, as testified to by Sharron.
[81] Complaint paragraph 7(k)

According to the testimony of M Martin, Respondent has always used AJI to perform primarily three types of tasks or jobs: "capital projects," which is the installation of new equipment and systems, including special projects, defined as anything that Respondent lacks the manpower to do; warranty work on its equipment, which was purchased through AJI, which is Respondent's distributor; and "overflow work," to fill-in when Respondent is short-handed or "over-whelmed" and doesn't have enough available employees. According to Sharron, AJI employees also performed "walk-throughs," which appear to be part of special projects, although that is not completely clear. He approves the invoices generated by AJI, four of which were introduced in the record. One of the invoices, for work performed February 13, describes the work performed as "clean up shop, Fix leak on Dryer # 10," for work totaling 6.25 hours. On another invoice, for work performed on February 16, AJI bills for 11.3 hours for "Misc. work," apparently referring to miscellaneous work. Sharron testified that Respondent's engineers typically perform clean-up work, if there are enough of them, and that the miscellaneous work was probably part of a special project or walk-through job, although he could not be certain (Tr. 182–184; 241–246; 269–270; 274–277; 394–399; GCX 37 (a)-(d)).

Servin testified that AJI employees are in the plant "all the time," but work on separate projects. Nonetheless, he conceded that long before the union election AJI had performed "overflow work," which was filling in for Respondent's engineers when they were short-handed or their hours had been cut, and had seen them perform work that Respondent's engineers typically did. For example, in the fall of 2016, when Respondent's engineer's hours were cut to 30 per week, Respondent brought in AJI workers to fill the gaps. Servin testified that after Arellano was discharged, he was working side-by-side with an AJI engineer named Mitchell, who told him that he had been brought in to fill-in for Arellano. He said that this individual (Mitchell), worked an entire 40-hour day shift, as Arellano normally would have, and that this was highly unusual (Tr. 561–566; 568–574).[82]

In sum, the basis for General Counsel's allegations regarding this issue rests on Servin's testimony, to the effect that he observed an AJI employee fill-in for Arellano for an entire 40-hour week following his discharge, as allegedly this AJI employee admitted to Servin.[83] To a lesser extent, the General Counsel also relies on a couple of vague entries on two invoices submitted by AJI for "miscellaneous" and "clean-up" work to support its allegation that Respondent was employing AJI employees to perform bargaining unit work. I find that the General Counsel's evidence is insufficient to show that Respondent had clearly departed from past practice in its use of AJI workers, or that they were doing bargaining unit work, and that hence it did not meet its burden of proof to establish this allegation by the preponderance of the evidence.

[82] Curiously, however, there are no invoices from AJI in the record that would show that one (or more) of its engineers worked a 40-hour shift during the week(s) that followed Arellano's discharge on February 13, or at any other time. Its stands to reason that if such work had been performed, if would likely be reflected on such an invoice.

[83] I would note that this alleged statement by the AJI employee is textbook hearsay, and although under Board rules and precedent I am not strictly bound to exclude hearsay, I do not give this statement much weight in light of all the circumstance and other evidence.

13. Respondent's alleged refusal to release Servin to attend bargaining sessions

The complaint alleges that about April 24, Respondent refused to honor the Union's request to release an employee from work to attend a bargaining session (between Respondent and the Union).[84] Although Respondent initially denied this allegation in its answer, M Martin admitted in his testimony that the Union requested that Servin be granted unpaid time off and be released from work in order to attend a bargaining session, and that he denied the Union's request. The request and the denial are contained in emails exchanged between E Martin and M Martin on April 17–19 (Tr. 189–190; 432; GCX 31). Nonetheless, a close review of the email exchange between M Martin and E Martin reveals that the denial was not an absolute one that foreclosed the opportunity for Servin to participate in the negotiations. After E Martin explained that the Union was not requesting that Servin be paid for his attendance but rather requesting unpaid leave for him, M Martin replied that Servin would have to follow the usual procedure and request personal time off (PTO) from his supervisor, Sharron. He added that since the date in question was less than 2 weeks away, this might be difficult. The record shows no further communications about this subject, nor shows whether Servin requested PTO from Sharron.

14. The allegations regarding Respondent's conduct during negotiations

The complaint alleges that during negotiations for an initial collective-bargaining agreement during the period between April 27 and July 18, Respondent failed to make bargaining proposals or counterproposals, and failed to cloak its representative(s) with the authority to enter into binding agreements. Respondent denied these allegations in its answer. It is undisputed that the main representatives and spokespersons for the parties during negotiations were M Martin for Respondent and E Martin for the Union, although other representatives were also present at various times for the Union in addition to E Martin.

M Martin testified that the first face-to-face meeting between him and E Martin for the purpose of negotiating a collective-bargaining agreement (CBA) took place about April 27, and that the parties had between 5 and 10 sessions altogether thereafter. At the first session, the Union presented him with a "hard" (paper) copy of a proposed CBA consisting of about 30 pages, and he received both a hard-copy and an electronic copy in a PDF format.[85] The proposed CBA contained some blank spaces for items that needed to be negotiated, such as a time period for its duration, and did not include any wage of benefit proposal(s). M Martin requested that a copy in Word (for Windows) format be provided, so that the Employer could "redline it," that is, make changes and edits in the document itself in order for Respondent to respond to the Union's proposals. The Union did not accede to or comply with the request for a copy of the proposal in Word format, but M Martin admitted he could have taken notes or manually redacted changes in the hard copy of the document itself. The parties met again on May 23, and on that date the Union submitted an amended copy of the proposed CBA submitted earlier, this time with wage proposals (GCX 32). On July 11 and 18 the parties met again, but there were no agreements reached. On July 26, for the first time, M Martin responded in writing to the Union's May 23 CBA proposal. The response is in the form of a 5-page letter, sent via email, which enumerates each section of the Union's proposed CBA and provides a response to each section individually,

[84] Complaint paragraph 7(m)

[85] Respondent had received an electronic copy of the proposal via email on March 30 (Tr. 264; RX-18).

in essence rejecting all of the proposals for various specified reasons (GCX 33).[86] M Martin also testified that at the July 18 meeting, he told the Union that while he might be able to agree "in concept" to some proposals, he did not have the "final" authority to approve any proposal. He explained that he would have to get final approval—or ratification—from Respondent's board of directors, which was comprised of himself, Dramise, Bert Arnlund, and John Smagala. In other words, board approval was necessary before "we were done." [87] Dramise testified that his instructions to M Martin regarding the negotiations were for him to "work out the best deal" he could. He also testified that M Martin had the authority to negotiate and "enter" into an agreement with the Union, but that such agreement would need his final approval (Tr. 191–205; 264–265; 349; 354–355).

E Martin testified that the Union and Respondent have had about 8 face-to-face bargaining sessions to date, and confirmed M Martin's testimony that Respondent had submitted its first counter-proposals in writing the week earlier (in late November). The first Union CBA proposal, submitted electronically to Respondent on March 30, contained no wage proposals, but the Union later added these, about June.[88] He confirmed that M Martin had requested that the Union's CBA proposal be submitted in Word format, which he declined, and that M Martin suggested Respondent would not respond to his proposals until the Union's proposal were submitted in that format. According to E Martin, M Martin did not agree to a single proposal contained in the proposed CBA during any of their meetings, and indeed informed him that he did not have the authority to agree to any specific proposal, because he had to take any such proposal back to the board for approval and could not agree to anything on his own. In many of their meetings, E Martin testified, M Martin would not give firm answers on any proposals, not saying yes or no, simply stating that they would "get back to him." He spent a considerable amount of time during their meetings explaining the different proposals to M Martin, who appeared "unfamiliar" with CBA contractual language (Tr. 432–439; 447–457).

In sum, as more thoroughly discussed below, I conclude that the evidence shows that Respondent, during the negotiations discussed above, did not make or proffer any proposals or counter-proposals to the Union, but simply responded to the Union's proposals by rejecting them on July 26. Additionally, I conclude that the evidence shows that Respondent's main—and only—negotiator, M Martin, informed the Union during negotiations that he lacked the authority to formally or finally agree to any proposals absent ratification by Respondent's board of directors.

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[86] Although each section elicits an individual response, the typical answers contain phrases like "This… is not acceptable, (or unacceptable)," "We don't (or cannot) agree," "We would like to strike this," "…needs to be changed," etc. (GCX-33). According to M Martin, he had verbally explained to the Union, during their prior meetings, why he didn't like or accept each of the items, and the Union providing explanations as to why they were making the proposals. M Martin also testified that Respondent submitted its first counter-proposal in late November or early December, a few days before the hearing resumed (on December 4) (Tr. 198).

[87] In answering a specific question I posed, M Martin explained that assuming he came to a "meeting of the minds" with the Union on some proposal, he could not "sign off" on or formally agree to any proposal without first getting board approval. (Tr. 203–204)

[88] He explained that the Union had not been able to formulate a wage proposal earlier due to Respondent's failure to submit information the Union had requested. He also explained that he did not want to submit his CBA proposal in Word format because the Union was concerned that it could easily—and maliciously—be redacted to convey the false impression that the Union had proposed something that it had not.

15. The failure to notify and bargain with the Union prior to terminating Arellano, Walker and Servin

The complaint also alleges that Respondent failed to notify, or bargain with, the Union prior to terminating Arellano, Walker or Servin.

There is no evidence that Respondent notified the Union prior to discharging Servin on May 2, or that it bargained with the Union regarding the imposition of such discipline. On the other hand, as previously discussed, the evidence shows that M Martin notified the Union (E Martin) via email on February 7–8, of its intention to have a lay-off (as well as schedule change), as previously discussed. As discussed above, the parties met for almost 4 hours on February 9, and although there is little direct evidence or testimony as to what occurred in that meeting, M Martin's email to E Martin on February 10 describes a discussion between the parties about Arellano's intended discharge. E Martin never responded to refute this assertion, so I conclude that such discussion indeed took place on February 9.[89] In the February 10 email, M Martin also discusses in detail Respondent's plan to discharge Arellano (as discussed the day before), and to lay-off Walker (GCX 9(a); 22; 23). There is no evidence that the Union specifically requested (further) bargaining about Arellano or Walker before Respondent discharged Arellano on February 13 and laid Walker off on February 15.

IV. DISCUSSION AND ANALYSIS

1. The employee handbook rule

As discussed in the Facts section (B. 1, above) at issue is the existence of a rule under Section 5-4 (Use of Social Media) of the employee handbook that would appear to potentially restrict protected activity by employees. While the entire rule in question is cited above, the General Counsel and Respondent, in their post hearing briefs, appear to agree that the portion of the rule at issue is the following phrase: *The Company urges all employees to refrain from posting information regarding the Company that could embarrass or upset co-workers or that could detrimentally affect the Company's business.* As noted earlier, there is no evidence that this rule has actually been applied or enforced to interfere with Section 7 rights.

As discussed above, after the hearing the General Counsel withdrew most of the complaint's allegations regarding the employee handbook in the wake of the Board's ruling in *Boeing Co.*, 365 NLRB No. 154 (2017), which was issued about 10 days after the close of the hearing in this case. In *Boeing Co.*, the Board overruled parts of *Lutheran Heritage Village-Lithonia*, 343 NLRB 646 (2004), and announced a new analytical framework under which facially neutral rules should be examined to determine whether they violate the Act. Under this new analytical framework, the Board will examine 3 categories of rules:

1. Category 1 will include rules that the Board designates as definitely lawful, either because (i) the rule, when reasonably interpreted does not prohibit or interfere

[89] Indeed, I previously found E Martin's assertion that he did not find out about Arellano's discharge until February 13 was not credible, as contradicted not only by these emails, but by Arellano's testimony as well.

with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.

2. Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
3. Category 3 will include rules that the Board will designate as definitely unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact is not outweighed by justifications associated with the rule.

Curiously, the General Counsel, while citing and paying lip service to *Boeing Co.* in its brief, proceeds to ignore the analytical framework described above, instead citing *The Sheraton Anchorage*, 362 NLRB No. 123 (2015) for the proposition that any rule that bars employee conduct that "publicly embarrasses" the employer has substantial impact on employee rights and is therefore unlawful.[90] Without actually saying so, the General Counsel appears to be arguing that the rule at issue in this case falls under "category 3," and that little, if any, justification was provided by Respondent in order to outweigh the presumption of unlawfulness that this rule carries. Respondent, on the other hand, essentially argues that this rule falls under "category 1," either because it is so "innocuous" that no employee could reasonably interpret it to interfere with Section 7 rights, or because its negligible potential impact is outweighed by its justifications. In that regard I would note that Respondent argues that the Act does not protect conduct that embarrasses or upsets coworkers, nor protects conduct that detrimentally affects the employer's business. It further argues that this rule was simply designed to promote a congenial and professional workplace free of discrimination or harassment.

I conclude that the ruling in *Sheraton Anchorage*, which was not overruled or even cited in *Boeing*, strongly suggests that this rule would fall under a "category 3" and would therefore be presumptively unlawful, absent justification that outweighs its unlawful impact. In so concluding, I note, contrary to Respondent, that activity protected under the Act cannot be suppressed merely because it may upset or even offend other employees, or because it may be "detrimental" to the employer's interests. Such is the essence of 80 plus years of Board and court rulings under the Act. It is reasonable to infer, for example, that many employees disfavor, or even abhor, unions, and that union activity in many, if not most instances, can arguably be "detrimental" to an employer's interests. Yet the right to engage in union activity goes to the core of the Act, and such activity cannot be deterred because of the negative impact it may have on other employees or the employer. Moreover, I note that the language of the rule in question does not address the posting of information *about other employees* that might upset them, which could be justified for privacy reasons, but rather the posting of information *regarding the Company* that could embarrass or upset employees, or detrimentally affect *the Company's business*. Thus, as with the rule in *Sheraton Anchorage*, the employer in this instance appears to

[90] Indeed, the General Counsel appears to go out of its way to point out that even then-Member Miscimarra, whose then-minority views were adopted by the Board majority in *Boeing Co.,* agreed in *Sheraton Anchorage* that such rule went too far. Be that as it may, the analytical framework under *Boeing* still needs to be applied, something General Counsel failed to do.

be trying to protect *itself* at the expense of employee Section 7 rights, without a reasonable or truly applicable justification.[91]

Accordingly, and for these reasons, I conclude that the above-cited rule unreasonably interferes with employee Section7 rights, and therefore violates Section 8(a)(1) of the Act.

2. The conduct by Sharron about January 24 and 25

As described in the facts section, shortly after the Union filed its representation petition, E Martin visited Respondent's facility and informed M Martin that the Union was organizing Respondent's engineers. M Martin then asked Sharron if he knew anything about this, and Sharron said he did not know but would find out. I concluded that the following events then took place:

- Sharron asked Arellano and Servin if they knew anything about the Union, and also separately asked Arellano if he supported the Union, in the presence of two other supervisors, Marsh and Scott, and told Arellano he would call the other engineers to ask them what they knew about the Union. Servin denied knowing anything, but Arellano said he supported the Union because he had previously worked for a union company;
- Sharron told Servin that the Union only wanted his money, and asked him how he would vote;
- Sharron proceeded to ask all the engineers, one by one, either in person or by telephone, if they knew anything about the Union organizing. They all replied that they knew nothing, and Sharron reported back to M Martin accordingly;
- A day or so later, Respondent received in the mail a copy of the representation petition that had been filed by the Union with the Board.

The General Counsel alleges that the above conduct violated section 8(a)(1) of the Act, because the questions about union activity constituted unlawful interrogations or, in the case of Sharron's statement to Servin about what the Union wanted, it was a coercive statement. It is well-settled that the circumstances surrounding the questioning of employees about their protected activity—that is, the time, place, manner, rank of those involved, and whether the employee in question is a well-known union supporter—is crucial in determining whether such conduct is coercive and thus in violation of the Act. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), *affd. sub nom*, *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Bourne v. NLRB*, 332 F.2d 47 (2nd Cir. 1964); *Camaco Lorain Mfg Plant*, 356 NLRB 1182, 1182–1183 (2011). Examining those factors in this case, I first note that Sharron, whose rank is just below that of M Martin and equal to Marsh's, embarked on this conduct repeatedly, at the apparent behest of M Martin, and interrogated the entire engineering department, one by one, as he admitted doing. Thus, this was not an isolated event involving a low-level supervisor asking a casual question of a single employee in the shop floor, but rather a sustained campaign of interrogations that enmeshed everyone in the unit. Moreover, except for Arellano, who admitted the second time he was questioned that he supported the Union, all others falsely denied knowing

[91] I would also note that the rule does not even indirectly make reference to harassment or discrimination of other employees, a justification that would be applicable if the rule was worded to address such valid concern.

anything about the Union—a sure sign of intimidation. Finally, I also note that these series of interrogations are themselves not isolated events, but rather part and parcel of a larger picture involving other coercive conduct by Respondent, as will be discussed below. We cannot therefore view Sharron's conduct in isolation, but must view it in the context of other conduct engaged in by Respondent during this time period.

Accordingly, I conclude that by asking employees whether they knew about the union campaign, and by asking whether they supported or would vote for the Union, Respondent unlawfully interrogated employees in violation of Section 8(a)(1) of the Act.[92]

On the other hand, I find that Sharron's comment to Servin to the effect that the Union only wanted to "take his money" was not coercive or otherwise unlawful. Employers are explicitly allowed to express their opposition to, even their distaste for, unions under Section 8(c) of the Act, not to mention the First Amendment, so long as this expression "contains no threat of reprisal or promise of a benefit." Sharron's statement might indicate disdain or even contempt for the Union, but contains no explicit or implied threat or promise.[93] The Board has long recognized that union election campaigns can be bruising affairs during which some nasty things will be said, but absent a threat or promise, a violation of the Act cannot be determined on the basis of whether feelings are hurt. Accordingly, I recommend that this allegation(s) of the complaint be dismissed.[94]

3. The conduct by Dramise and Sharron about February 1

I concluded that about February 1, Dramise called Arellano and Servin to a meeting in the conference room and told them that if the Union was voted in, Respondent would no longer honor their "contracts," by which he meant, and they understood to mean, their wages, hours and working conditions. It is by now axiomatic that employers may not threaten adverse consequences if their employees unionize, or even predict adverse results absent a proper explanation based on objective facts beyond the employer's control. *NLRB v. Gissel Packing CO.*, 395 U.S. 575, 618 (1969); *Smithfield Foods, Inc.*, 347 NLRB 1225, 1229 (2006); *Reeves Bros., Inc.*, 320 NLRB 1082, 1082–1083 (1996); *Swinline Co.*, 256 NLRB 704, 716 (1981).

Respondent argues that Dramise was simply stating that Respondent would have to negotiate with the Union about wages, hours and working conditions if it was selected as its employees' representative. It is true that employers may inform employees that choosing to be

[92] The General Counsel also alleges that when Sharron told Arellano he would call the other engineers to find out what they knew about the Union, this constituted surveillance. This amounts to hair-splitting, in my opinion. What Sharron did was to inform Arellano he was going to *interrogate* them—which is what he proceeded to do.

[93] According to Servin, whom I credited, Sharron said that the Union was "just interested in taking my money, and I'd only get $25 on my check, and that's all they'd be interested in, just taking my money" (Tr. 529). The General Counsel asserts that by telling Servin that he would end up with only $25 in his paycheck, Sharron was implying Respondent would reduce his pay, making this a threat. This argument ignores the context in which the statement was uttered, and the obvious implication that it would be the Union's dues (or fees) that would result in his paycheck reduction. Accordingly, I do not find that Sharron uttered threat about what Respondent would do, but rather voiced his opinion as to what the Union was really after.

[94] These allegations are contained in paragraph 5(b)(2) & (3), which allege a threat and an expression that selecting the Union would be futile. I conclude neither occurred.

represented by a union does not automatically guarantee better wages or benefits. *Fern Terrace Lodge*, 297 NLRB 8 (1989); *Libertyville Toyota*, 360 NLRB 1298 (2014). Indeed, employers may inform employees that collective bargaining amounts to a "roll of the dice" that could result in wages and benefits getting better, getting worse, or staying the same. *City Market, Inc.*, 340 NLRB 1260, 1272–1274 (2003); *Mediplex of Connecticut, Inc.*, 319 NLRB 281 (1995). This is not, however, what Dramise told Arellano and Servin, at least not how it came out, despite of what Dramise might have intended. What Dramise said, and what Arellano and Servin heard, in my view, amounted to a threat. Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act by this conduct.

Additionally, I also found that about February 1, Sharron told Servin that he had figured out who the union supporters (or organizers) were, and named Arellano, Walker and "Rico" (whose last name is unknown). I find that this statement by Sharron would reasonably tend to create the impression that Respondent was engaged in surveillance of its employees' union activities. *Register Guard*, 344 NLRB 1142, 1144 (2005); *Caterpillar Logistics, Inc.*, 362 NLRB No. 49, slip op at 1–2 (2015). Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act by engaging in this conduct.

4. The termination of Arellano, Walker and Servin

As previously discussed, it is undisputed that Respondent discharged Arellano on February 13 and Servin on May 2, and laid-off Walker on February 15. What is in dispute is the motivation or reasons for these individuals' termination. Because Respondent's motivation in terminating these three employees is at issue, these allegations must be evaluated pursuant to the Board's analysis discussed in *Wright Line, a Division of Wright Line, Inc.* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management, Inc. v. NLRB*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must initially demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor for an employer's adverse employment action. The General Counsel initially meets its burden under this test by showing that the employee was engaged in protected activity, the employer had knowledge of such activity, and the employer had animus. Once the General Counsel has met this burden, the burden shifts to the employer to show that it would have undertaken the same adverse action even in the absence of protected activity. *Michigan State Employees Association*, 364 NLRB No. 65, slip op. at 5, fn. 17 (2016). The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Western Refining*, 366 NLRB No. 83, slip op. at 1–2 (2018); Dentech *Corp.,* 294 NLRB 924, 956 (1989). If the evidence establishes that the reasons given for the employer's action are pretextual, that is, either false or not relied upon, the employer fails by definition to show that it would have taken the same action for those reasons, and its *Wright Line* defense thus fails. *Western Refining*, supra; *Libertyville Toyota*, supra; *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

Applying the above-cited criteria, I note that the evidence shows as follows. First, the evidence plainly demonstrates that all three individuals engaged in protected activity, and in the case of Walker, Respondent at minimum suspected that he had. With regard to Respondent's

knowledge that these three individuals were engaged in protected activity, there is strong evidence supporting the conclusion that Respondent had such knowledge. With regard to Arellano, he informed Sharron that he supported the Union, before the election, about February 1, as discussed above. Moreover, he wore a union button on the day of the election, something that was admittedly observed by one of Respondent's supervisors, Linares. Finally, Sharron told Servin that he believed Arellano was one of the union supporters or organizers, along with Walker and another individual. Regarding Servin, he also started wearing union buttons and union pocket protectors , and displaying union stickers on his tool box, on the day of the election and thereafter. Sharron admitted that Servin, after the election, told him he supported the Union, and Marsh testified that part of the reason why Sharron was ultimately discharged, as reflected in his termination slip, was that he had been observed distributing union paraphernalia. Finally, in April, prior to Servin's discharge, the Union requested that Respondent release him from work so that he could attend a bargaining session, a strong signal that Servin was a stalwart union supporter whose help the Union needed during negotiations.[95] As for Walker, he served as the lone observer, for the Union, during the February 6 election, and Sharron told Servin that he was suspected of being one of the main union supporters or organizers. In sum, the evidence clearly shows that Respondent knew, or at minimum in the case of Walker suspected, that these three employees had engaged in union activity or supported the Union.

There is also strong evidence of animus by Respondent toward the employees' union or protected activity. The unlawful conduct I have described above, namely interrogations, threats and creating the impression of surveillance plainly demonstrates that Respondent harbored animus toward the Union and those who supported it. In the case of Arellano, who Respondent decided to discharge only 2–3 days after the election, and Walker, who was laid off about 9 days after the election, the timing is also indicative of animus. Moreover, as will be discussed below, the shifting and sometimes plainly contradictory explanations provided by Respondent for the termination of all three individuals suggests pretext, which itself is indicative of animus. Finally, I take judicial notice of the recent Board decision in *Apex Linen Service, Inc.*, 366 NLRB No. 12 (2018), where the Board found clear evidence of animus in concluding that Respondent unlawfully suspended and then discharged an employee for engaging in union activity during the 2015–2016 period.[96]

In light of the above, I conclude the General Counsel met its *Wright Line* burden to show that the adverse action taken toward Arellano, Walker and Servin was motivated, at least in part, by their union activity. The burden thus shifts to Respondent to show that it would have nevertheless undertaken the adverse actions even in the absence of protected activity. For the following reasons, I conclude that Respondent failed to meet this burden, because the evidence strongly supports the conclusion that the reasons proffered by Respondent were pretextual. In the case of Arellano, I first note that Respondent admitted he was a highly skilled engineer, who had previously received a performance award and who had no history of discipline or

[95] Sharron also testified that he had doubts about Servin having been ill and missing work in April, despite presenting a doctor's note, because he had been observed attending a union meeting.

[96] Although that case involved a different union (HERE International Union) and an employee in a different bargaining unit, the evidence of union animus is still relevant to the instant case. Animus need not be directed at a particular union or specific type of protected activity; it suffices to show that Respondent had animus toward union or protected activity in general.

performance problems. The way his abrupt termination came about, only a few days after the election and without the semblance of minimally adequate investigation about his alleged misconduct, is a clear and classic indicator of pretext. Respondent asserts that the reason he was discharged is that he attempted to persuade a coworker to make, or file, a fraudulent "worker's compensation" claim. No such thing even remotely occurred. Briefly, as discussed in the facts section, Arellano was asked by a dry-cleaning department worker, Hernandez, to open up a bottle of a chemical stain remover. Arellano noticed her bloodshot eye, and asked her what had occurred. Hernandez replied that she did not know (but admitted that her eye was normal before she started her work shift). Arellano told her to report her injury to her supervisor—and get medical help if needed.[97] He also told her she should be wearing safety glasses, to avoid eye injuries. Hernandez then told him she was not sure (or didn't think) her injury had occurred at work. After Hernandez told him this, Arellano did not again tell her, or in any way insist or suggest, that she inform the employer that the injury had occurred at work. The conversation then ended.[98] I find that Arellano acted in an entirely appropriate manner, and indeed showed concern for an apparently injured coworker.

M Martin admitted he made the decision to discharge Arellano based solely on this incident, even though he never interviewed Arellano or Hernandez to get their versions of what had transpired. He relied instead on Linares' report of what Hernandez had said to her, and the short statement written by Hernandez. Based on this miserly report(s), and without conducting even the semblance of a proper investigation, M Martin somehow concluded that Arellano was guilty of instigating "worker's compensation" fraud, a term or action that was not even remotely used or suggested during the conversation between Arellano and Hernandez. This rush to judgment without bothering to ascertain all the facts marks a "shoot first, ask questions later" attitude that strongly suggests that Respondent was looking for any excuse, feeble as it may be, to discharge an individual it viewed as one of the main union supporters. As the Board stated in *New Orleans Cold Storage & Warehouse, Ltd.*, 326 NLRB 1471, 1477 (1998), enfd. 201 F.3d 592 (5th Cir. 2000), "the failure to conduct a meaningful investigation and give the employee who is the subject of the investigation the opportunity to explain are [likewise] clear indicia of discriminatory intent."[99] Likewise, the Board will infer unlawful motivation or animus where the where the employer's action is "baseless, unreasonable, or so contrived as to raise the presumption of an unlawful motive," *J. S. Troup Electric*, 344 NLRB 1009 (2005), and cases cited therein. I conclude that Respondent's proffered reason for discharging Arellano was exactly that: baseless, unreasonable and contrived.[100] Accordingly, Respondent failed in its

[97] Even assuming, for the sake of argument, that Arellano said for her to go to the "company doctor," that does not reasonably imply that he was suggesting she engage in worker's compensation fraud.

[98] I note, as Arellano testified, that Respondent's employees work in an environment filled with potential eye irritants, including chemicals, fumes, lint and machine part shavings. Any reasonable person, under these circumstances, would have logically assumed that Hernandez's eye irritation had occurred at work.

[99] I would note that in the recent Board case involving this Respondent, *Apex Linen*, supra, the Board also found unlawful motivation based in part on Respondent's poor investigation of the affected employee's alleged misconduct. In this instance, the investigation—if that's what it can be called—was even shoddier. This has apparently become Respondent's modus operandi.

[100] This conclusion is further enhanced by the inclusion of purported sabotage by Arellano in his termination slip, something which was admitted by M Martin not to be true, as well as "insubordination," which did not occur.

burden to show that Arellano would have been discharged even in the absence of protected activity, and I find his discharge was thus unlawful.[101]

With regard to Walker's lay off, for the same reasons as explained above, I find that the General Counsel met its *Wright Line* burden. One distinction that must be noted with respect to Walker is that unlike Arellano and Servin, Walker was laid off, presumably for economic reasons, and not discharged. Indeed, M Martin testified that he was re-employable, although later events put that into question. Nonetheless, Respondent has the burden of establishing that he would have been laid off even in the absence of protected activity. I conclude that Respondent did not meet that burden. Although Walker's case is not as strong or compelling as Arellano's, I conclude that the reasons proffered by Respondent for his lay off, including its timing, appear pretextual. In that regard I note that the evidence shows, based to a large degree on M Martin's testimony, that on previous occasions when worked had slowed down, Respondent had opted to reduce the hours of all engineers across the board—a practice allegedly in response to the stated preference of the engineers themselves. In Walker's instance, M Martin explained that there had been "rumblings" from the engineers that they did not want their hours cut. When pressed to name which engineers had complained, M Martin could only name one—Joe Tuttle. I therefore did not credit M Martin's testimony, and accordingly conclude that this was a pretext. This conclusion is further reinforced by the fact that M Martin had notified the Union that the "graveyard shift" shift, where Walker worked, would be shut down, and that two other engineers would be laid off—which did not occur. This disparate treatment was not explained, and together with the departure from past practice, further suggests unlawful motivation. Further, even assuming that the reasons provided by Respondent are not pretextual, it did not proffer any credible evidence to support its burden to show that its adverse action against Walker would have taken place regardless of protected activity.

Finally, regarding Servin's discharge on May 2, the General Counsel also met its *Wright Line* burden.[102] I conclude that Respondent failed in its burden to overcome the General Counsel's case, inasmuch the reasons it proffered for Servin's discharge are pretextual. As I

[101] The General Counsel has also alleged that Respondent violated Arellano's *Weingarten* rights by denying his request for union representation during the meeting on February 13 when he was given his termination notice (Complaint paragraphs 5(f), (g), and (h);). As Arellano himself admitted, however, his termination was final, as confirmed by M Martin, and he was there only to receive his marching papers. The fact that M Martin gave him a piece of paper and told him he could write on it if he wished to explain anything doesn't change that equation, because that fact does not establish that Respondent had changed its mind and was reconsidering. A significant factor which makes Arellano's unlawful discharge case so compelling, as discussed above, is that it was so inexplicably and unreasonably abrupt. If, as required to support a *Weingarten* violation, the General Counsel now argues that Respondent had reconsidered and wanted more information before deciding whether to discharge Arellano, this conclusion would inevitably weaken its theory of a violation regarding his discharge. The General Counsel should be careful what it wishes for. Fortunately for the General Counsel, its *Weingarten* theory makes no sense under the circumstances and has no merit, and I dismiss those allegations of the complaint.

[102] May 2 is underlined because the General Counsel, for reasons I cannot fathom, has also alleged that Servin was discharged on April 4 as well (Complaint paragraph 6(c)). As the evidence introduced by the General Counsel itself established, however, Servin was not discharged on April 4. Respondent may have planned, intended, and wished to do so, but it did not do so, as the discharge it had planned was rescinded and Servin did not lose even a minute of work or wages. Accordingly, this allegation of the complaint is dismissed. Nonetheless, this doesn't mean that the events of April 4, as discussed in the facts section, are not important. As I stated then, it appears that this was a "dress rehearsal" for the events that were soon to follow, and indicate, as with Arellano's case, that Respondent was willing to "shoot first and ask questions later," and eagerly looking for any excuse to discharge Servin.

detailed and discussed in the facts section, I found the reasons given by M Martin, Marsh and Sharron to explain and support Servin's discharge were inconsistent, contradictory, unreasonable—and not credible. Not only did they contradict each other as to who made the decision, but also as to how the decision was made, and the reasons therefor. Indeed, the litany of reasons testified to by these three supervisors, only some of which are codified in his termination slip, appear to be nothing short of an attempt to "throw mud at the wall" in the hopes that some of it would stick. Although the primary reason given appears to be related to his alleged improper "call offs," the evidence shows, as admitted by Sharron—Servin's immediate supervisor and person who decided if an engineer had provided proper notice—Servin had provided timely notice for each of his alleged absences, and provided a valid excuse. Indeed, Sharron begrudgingly admitted that Servin's final absence had been properly excused by a valid doctor's note—which he nevertheless still questioned because he had found out that Servin had attended a union meeting during the time he was ailing with an ear infection.[103] In sum, the shifting, contradictory and unreasonable explanations proffered to justify Servin's termination smack of pretext. While Servin may not have been a perfect employee and likely had some issues, he had not received any formal or written warnings about his performance or conduct, and in the end Respondent's shifting justifications do not hold water. Accordingly, I conclude that Respondent did not meet its burden as to Servin, and that his discharge was therefore unlawful.

Accordingly, I find that Respondent violated Section 8(1) & (3) of the Act by terminating the employment of Arellano, Walker and Servin.

5. The Union's request for information

It is by now axiomatic that a union that represents employees in collective bargaining is entitled to request and receive from employers information that is reasonably necessary to fulfill its duty as the employees' collective bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149,156 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Detroit News*, 270 NLRB 380 (1984). Thus, any refusal to provide, or an unreasonable delay in providing, such information represents a failure to bargain in good faith and violates Section 8(a)(1) & (5) of the Act. Moreover, the obligation to bargain in good faith, in the context of the obligation to provide information relevant to collective bargaining responsibilities, presumes a spirit of cooperation between the parties. While this obligation does not compel parties to agree to anything, or provide information not required or privileged, the obligation to deal in good faith reasonably assumes that the parties will be forthcoming and cooperative—different in tone and spirit to that of parties involved in adverse proceedings, such as litigation.

As discussed in the facts section, much information was requested by the Union in this case. Much of the information sought by the Union was in preparation for negotiating an initial collective-bargaining agreement, but some of it was sought in connection with some of the

[103] This explanation itself shows animus. Assuming the information relayed to Sharron was accurate, and I note Servin was never asked about it, there is a big difference between attending a union meeting, which may last an hour or two, and working an 8-plus hour shift while sick and under the influence of medications, performing maintenance or repairs on machinery which may be dangerous-and loud. Thus, I do not find it reasonable for Respondent to label Servin's absence was unexcused, despite the doctor's note, because he attended a union meeting while on sick leave.

actions Respondent took following the election, such as schedule changes, the closing on a break room, the use of outside contractors, and the termination of some employees. At the outset, it is clear to me that the Union was lawfully entitled to request and receive all the information sought and at issue herein, to the extent that such information existed and was in Respondent's possession or control. I have been provided with no authority or persuasive arguments to the contrary. Accordingly, at issue is whether the information was provided, was unreasonably delayed, or whether the information did not exist or could not be provided for other reasonable and valid reasons.

I will discuss the information requests in the order alleged in the complaint, as enumerated in the facts section, above:

Item 1(A list of current bargaining unit employees including their…date of completion of any probationary period) was requested by the Union on February 6. As discussed above, the list of unit employees was provided by Respondent via email on February 10, so Respondent complied with this request, and this part of the allegation has no merit. The information regarding completion of probationary periods is not kept or does not exist, so there is no obligation to provide this information. Respondent, however, failed to inform the Union of this fact, which in my view represents a failure to be forthcoming and thus to bargain in good faith, in violation of Section 8(a)(1) & (5) of the Act.

Item 2 (Copies of all manuals, training materials, documentation, memoranda, communications and policies related to the operation of any work distribution system currently in use.), was requested by the Union on February 6. In response to this request, Respondent asserted that its manuals were too voluminous to provide, but never provided or suggested to the Union an alternative method of reviewing the manuals, such as giving the Union access to the plant to review these. I find Respondent, in these circumstances, has an obligation to offer or provide an alternate method of accessing the information sought. With regard to the training records, Respondent, after incorrectly informing the Union that training records did not exist, it failed to inform the Union when these records were later discovered. While providing incorrect or false information due to an honest or inadvertent error is not unlawful, failing to disclose such mistake once discovered represents the essence of bad faith. I conclude Respondent violated Section 8(a)(1) (5) of the Act due to these failures.

Item 3 (A list of employees who have had schedule changes, including dates and job classifications at time of schedule changes.) was requested by the Union on February 6. As discussed above, the preponderance of the evidence indicates that Respondent did provide this information via email on February 10. Accordingly, I find no violation in this instance.

Item 4 (A copy of all policies or procedures with respect to employment of employees.) was requested by the Union on February 6. As discussed above, although Respondent provided the employee handbook in response to this request, it did not include other information and sources referenced in the handbook. By failing to provide these, I conclude Respondent violated Section 8(a)(1) (5) of the Act.

Item 5 (A copy of all training records for Mr. Arellano.); Items 6 (A copy of Mr. Arellano's employee evaluations) and Item 7 (Copies of all evidence, written statements, video/audio recordings used to determine to terminate Mr. Arellano's employment), were requested by the Union on February 13 in the wake of Arellano's discharge. As discussed above, the evidence shows Respondent failed to provide the Union with this information, even though it had possession of a videotape and an employee Statement (by Hernandez) related to Arellano's discharge. By failing to provide the Union with this information, Respondent violated Section 8(a)(1) (5) of the Act.[104]

Items 8 (Information responsive to the question of what was behind Respondent's decision to lay-off employees and change employees' schedules), 9 (Evidence to support the claim that business need requires layoffs/schedule changes) and 10 (Copies of all outside contractor's invoices for maintaining/installing/servicing laundry equipment in the plant for the past 5 years). As discussed above, I credited E Martin's testimony that these items were not provided, and no persuasive evidence was proffered by Respondent to the contrary. Accordingly, I find that by failing to provide the Union with this information, Respondent violated Section 8(a)(1) (5) of the Act.

6. The closure of the engineers' break room

The complaint alleges that by closing the engineers' break room on February 7, Respondent retaliated against its employees for engaging in union activity, in violation of Section 8(a)(1) and (3) of the Act (complaint paragraphs 6(f) & (g)). It also alleges that Respondent failed to bargain with the Union regarding the closure of the break room, in violation of Section 8(a)(1) and (5) of the Act. For the following reasons, I conclude that Section 8(a)(1) and (3) allegations have merit, but not the Section 8(a)(1) (5) failure to bargain allegations.

As discussed in the facts section, I concluded that Respondent had made the decision to close the engineers' break room long before the advent of the Union, and that it would have thus *eventually* closed the break room regardless of its employees' union activities.[105] Nonetheless, there is a twist to this story. While I am persuaded that Respondent met its burden under *Wright Line*, following the General Counsel's initial burden, to show that it would have closed the break room in any event, it failed to show that it would have closed it on the day after the election, on February 7. As I discussed previously in the facts section, I concluded that Respondent, in an apparent fit of spite as a result of its employees supporting the Union on the election on February 6, *accelerated* its intended closure of the break room, and shut it down the day after the election. As I explained, there is no evidence suggesting that Respondent had intended to close it so soon, not even giving the engineers time to retrieve their personal equipment and items, a sure sign that this was done in a haste. I find that this was intended as a signal to its employees that Respondent was unhappy with the results of the election and intended to play hard ball. Such retaliatory move, prematurely depriving the engineers of a benefit they had enjoyed for several

[104] Respondent asserts, in defense, that these items were requested after Arellano was discharged, appearing to suggest that this request was thus moot. I reject this defense as having no merit.

[105] Thus, to the extent that a *Wright Line* analysis is called for in this instance—which I do, despite the fact that neither party discussed such theory—I believe that the General Counsel met its initial burden, but then Respondent met its burden to show that it would have taken this adverse action even in the absence of protected activity.

years, violated Section 8(a)(1) & (3) of the Act. Although there is no way to tell exactly when such room would have eventually been closed, the evidence does support the conclusion that it would have been closed in the near future. Accordingly, I will not order, as the General Counsel requests, that the "status quo" be restored by directing that the break room be re-opened. Such order would be punitive, rather than remedial, in nature, which the Act does not authorize.

With the regard to the allegation that Respondent was obligated to bargain about its decision to close the break room, I find that this allegation has no merit. As discussed, the evidence shows that such closure had been planned and was in the works long before the Union even started organizing, and therefore Respondent was under no obligation to bargain about that decision. Accordingly, I dismiss the Section 8(a)(1) (5) allegation in this regard. Nonetheless, Respondent still had an obligation to bargain with the Union regarding the *effects* of its decision to close the break room. The record shows this is something Respondent did not do, since it did little more than inform the Union that it had long planned to close the break room (after it had already been closed) in light of its decision to build a new employee lunchroom. The failure to bargain over the effects of this closure violated Section 8(a)(1) & (5) of the Act, I conclude.

7. The alleged failure to bargain over the schedule changes

As discussed in the facts section, it is undisputed that Respondent changed the work schedules of its engineering department employees on/about February 18, April 7 and July 5. The General Counsel asserts that Respondent did not bargain with the Union to impasse, indeed at all, prior to making these changes. With regard to the changes on April and July, the evidence clearly shows that Respondent did not notify, let alone bargain with, the Union prior to making these changes. With regard to the changes that took place about February 18, the story—which General Counsel glosses over—is more complicated, and indeed the facts suggest that Respondent tried unsuccessfully to get the Union to meet and bargain about that specific topic, with the Union demurring.

As previously described in detail, the flurry of emails exchanged between M Martin and E Martin during the period of February 8 and 17 indicate that the Union initially requested, on February 6 and 8, that Respondent provide information contained in a specific list of items. The vast majority of the information requested, however, was related to over-all information about Respondent's operations which the Union needed to commence collective bargaining negotiations for an initial collective-bargaining agreement (CBA). On the evening of February 8, M Martin informed E Martin, in one of the emails, that Respondent needed to make changes in order to "function," and requesting that the Union bargain about these proposed schedule changes. The parties held a meeting on February 9, which lasted almost 4 hours, and during which, apparently, much information was exchanged, although the record is—unfortunately—mostly silent about the details of such meeting.[106] On (Friday morning) February 10, via email,

[106] From subsequent emails, however, we know that among other things, Respondent informed the Union about its plans to discharge Arellano and lay-off Walker, as well as its need to change the schedules in order to meet its production needs in light of such personnel changes. As previously discussed, E Martin's testimony that he knew nothing about Arellano's termination until after he had been discharged was clearly false, as corroborated by Arellano himself, and I accordingly found E Martin's credibility in that regard wanting. This credibility gap also plays a part as to what occurred during these email exchanges.

M Martin provided many of the items the Union had requested, although not all, as previously discussed. Among the items provided were the current and proposed schedule changes, and almost 1300 pages of time-keeping records (Respondent had not recorded or kept track of past schedule changes). In that email M Martin specifically requests that the Union respond by the end of the day, Monday February 13, so that Respondent can prepare for the schedule changes it wanted to implement by February 18. The Union did not respond until late on Friday, February 17, more than a week after the February 10 request from Respondent. In its February 17 email the Union appears to pretend it knew nothing about the proposed schedule change, stating "we have been informed that Apex Linen is proposing changes to the bargaining unit member's work schedules" on the following day, apparently awakened by its members' complaints, and demanding that Respondent refrain from changing the schedules until the Union had an opportunity to bargain and agree to those changes. The Union then makes additional information requests that it asserts it needs before it can negotiate. Respondent replied a few minutes later, asserting that the information had been already provided. The Union replies that it is still waiting for the "full list" of items it had requested. A careful reading of that "full list" however, reveals that most, if not all, of the items still outstanding were relevant only as to information that the Union might need in order to negotiate an over-all CBA, or information it might need with regard to Arellano's discharge or Walker's lay off, not information that the Union truly needed to bargain about the proposed schedule changes, which Respondent had been urging it needed to do since at least February 8. I would also note that collective bargaining negotiations for a CBA did not start until late April, more than 2 months later, so whatever information the Union needed for those negotiations could wait.

This sequence of events and communications strongly suggests that the Union was, at best, lackadaisical about Respondent's urgent requests to bargain about the schedule changes. Indeed, it dithered and stalled, not only because it saw no urgency from its perspective, but because it apparently felt it could rely on its need for all-encompassing information before it bargained on any topic.[107] In these peculiar and narrow circumstances, I do not find that Respondent failed in its duty to bargain. It attempted, in good faith, to do so, but was met with passive resistance by the Union, who obviously had no incentive to negotiate about a change that its members would likely find unpalatable. In so concluding, I take into account the fact that Respondent had an urgent business need to make these schedule changes, since it was apparently short-handed after it let go of Arellano and Walker.[108] In sum, I conclude that Respondent did not violate Section 8(a)(1) & (5) of the Act by failing to negotiate with the Union about the work schedule changes that it implemented on February 18.

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[107] In this regard I would note that in his February 10 email, M Martin specifically asked E Martin what additional information the Union needed, and requested a response by the end of the day Monday, February 13 because it needed to implement the new schedule on February 18. Not only did E Martin not reply until late on Friday, February 17, but then requested "additional" information that E Martin had either already supplied or had indicated did not exist. I find that this delayed response was not reasonable or illustrative of the good faith and cooperative spirit required in these circumstances.

[108] See, *Bottom Line* Enterprises, 302 NLRB 373 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994). There is an insinuation in the General Counsel's brief to the effect that since Respondent had unlawfully let go of these two employees, whatever pickle it found itself in was a product of its own making. In other words, that's "just too bad" and if Respondent needed to shut down production, so be it. I reject such insinuation—that's not how things work in the world of labor law. Respondent's only other alternative to avoid impacting production would have been to bring in more workers from AJ Industries to take up the slack, an action that would have certainly also been alleged as unlawful by the General Counsel.

With regard to the changes that took place on April 7 and July 5, the story is far simpler than regarding the February 18 changes. Simply put, Respondent neither notified nor bargained with the Union about these changes. Indeed, as discussed below, it completely by-passed the Union and dealt directly with its employees about these changes. Accordingly, I find that Respondent violated Section 8(a)(1) & (5) of the Act by failing to negotiate with the Union about the work schedule changes that it implemented on April 7 and July 5.[109]

8. Bypassing the Union and dealing directly with employees

The complaint alleges that about March 29 and June 21, Respondent bypassed the Union and dealt directly with employees regarding their working schedules. This is directly related to the work schedule changes discussed above. As discussed in the facts section, the evidence showed that on or about those dates employees went to management after having agreed amongst themselves to "swap" or trade schedules, and that management approved and switched those schedules accordingly.

The Board has held that an employer unlawfully deals directly with employees when (1) it was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, or working conditions; and (3) such communication was made to the exclusion of the union. *El Paso Electric Co.*, 355 NLRB 544 (2010), and cases cited therein. All three criteria are met in this case. Respondent's defense that this is simply the way it always did things—internally and informally—lacks merit in the face of the new reality that these employees were now represented by the Union. Accordingly, I find that Respondent violated Section 8(a)(1) & (5) of the Act as alleged.

9. The implementation of a new cell phone policy

This allegation, as discussed in the facts section, refers to the new cell phone use policy that Respondent imposed on Servin during the meeting on April 4 when he was almost discharged. As discussed in the facts section, this policy was never in place before, and appears to have been applied only to Servin. I conclude that by not notifying, or bargaining with, the Union about this policy, Respondent violated Section 8(a)(1) & (5) of the Act as alleged.

10. The use of third party workers to perform bargaining unit work

This allegation refers to the alleged use by Respondent of AJ Industries (AJI) employees, a third-party contractor, to perform bargaining unit work, without bargaining with the Union. As discussed in the facts section, however, I concluded that the evidence was insufficient to

[109] Respondent cites *Raytheon* Network *Centric Systems*, 365 NLRB No. 161 (2017) for the proposition that employers need not bargain about any changes that are similar in kind and degree with an established past practice, and since Respondent had made these type of scheduled changes prior to the advent of the Union, it needed not bargain about these. This is an exceptionally broad reading of *Raytheon* that would essentially eviscerate employers' duty not to impose unilateral changes, since it is reasonable to assume that all employers had wages, hours, working conditions—and policies and procedures relating to these—in place prior to any union showing up. Such interpretation of *Raytheon* is not only unwarranted, but directly contrary to the Supreme Court's ruling in *NLRB v. Katz*, 369 U.S. 736 (1962), which *Raytheon* relies on.

establish that in fact AJI workers were used to perform bargaining unit work. Indeed, the evidence failed to show that AJI workers were doing anything , in nature or scope, different that they had done for years at Respondent's facility prior to the advent of the Union. I therefore conclude that the General Counsel did not establish burden of proof to support this allegation by the preponderance of the evidence. The allegation is therefore dismissed.

11. The refusal to release Servin to attend negotiations

The complaint alleges that Respondent refused the Union's request to grant Servin unpaid time off to attend the collective bargaining negotiations, thus violating Section 8(a)(1) & (5) of the Act. As described in the facts section, however, it is not clear that Respondent flatly refused the Union's request, but rather informed the Union that Servin would have to follow the usual procedure and request (unpaid) personal time off from his immediate supervisor, Sharron. No further communications were thereafter exchanged by the parties about this subject, and there is no evidence as to whether Servin ever made such request to his supervisor. The General Counsel has not explained its theory of a violation, however, nor proffered any authority in support of the complaint's allegation in these circumstances. While the Board has held that under certain circumstances an employer violates Section 8(a)(1) & (5) if it refuses a union's request to grant an employee unpaid leave to take part in negotiations, those were situations where the employer refused such requests while at the same time refused to meet for negotiations during those employees' nonworking hours or days. See, e.g., *Ceridian Corporation*, 343 NLRB 571 (2004), enfd. 435 F.3d 352, 356 (D.C. Cir. 2006), and cases cited therein. Even assuming that Respondent firmly denied the request for Servin's release, however, there is no evidence or allegation that Respondent refused to meet for bargaining purposes during days or times when Servin was not working. Accordingly, I conclude that Respondent did not violate the Act as alleged, and dismiss this allegation of the complaint.

12. Respondent's alleged unlawful conduct during negotiations

The complaint alleges that Respondent engaged in conduct that exhibited bad faith during collective bargaining negotiations by not proffering any proposals or counter-proposals during bargaining (through July 18), and by not vesting its bargaining representative with the authority to agree to any proposals.

As described in the facts section, the parties had their first face to face bargaining meeting on or about April 27. The Union had earlier, on March 30, sent Respondent via email a proposal (in PDF format) for a collective-bargaining agreement (CBA), consisting of a copy of a proposed CBA—without wages or benefits. The Union handed a hard-copy of this proposal to Respondent on April 27 as well. At the time, M Martin requested that the Union provide an electronic copy of their proposal in a "Word" format, so that Respondent could edit or "red-line" the proposals for the sake of convenience. The Union did not agree to provide their proposal in this type of format. The parties met again on May 23, and the Union submitted an amended CBA proposal which included wages and benefits. The parties had additional meetings on July 11, July 18, and July 26, and during this time Respondent did not submit a proposal or counter-proposal of its own to the Union. There is sparse evidence as to exactly what the parties said during these meetings, but it appears that they were discussing the Union's proposals.

On July 26—the period beyond the July 18 marker the complaint alleges Respondent acted unlawfully—Respondent provided the Union with details as to why it was rejecting its proposals. Additionally, on July 18, for the first time, M Martin, who was Respondent's main negotiator, informed the Union that he did not have the authority to agree to any proposals absent agreement or confirmation by Respondent's board of directors. In his testimony, M Martin admitted that even if he came to a "meeting of the minds" (or agreed "in concept") with the Union regarding any individual proposal, he had no "final" authority to finalize such agreement absent approval by the board of directors.

In determining whether a party has engaged in bad-faith bargaining during negotiations, the Board examines the totality of the circumstances. First, with regard to the allegation that Respondent showed bad faith by not making any proposals or counter-proposals during the period from April 27 to July 18, as alleged in the complaint, I note that by this time the parties had met only four times for bargaining.[110] In this regard, the Union's first complete proposal was not submitted until May 23, their second meeting, at the earliest—indeed, E Martin testified that he had submitted his complete proposed CBA proposal in June or July. From the testimony of M Martin and E Martin, it appears that the parties spent most of the time in these first 3–4 sessions discussing the Union's proposals, with Respondent asking questions and the Union providing explanations as to what its proposals meant and as to why it wanted certain things. While it is undisputed that Respondent made no proposals during these first four bargaining sessions, the General Counsel has cited no authority for the proposition that failing to make proposals or counter proposals by itself, or in the context of only four meetings, is unlawful or constitutes bad faith. Indeed, there appears to be Board precedent to the contrary. See e.g., *WCUE Radio, Inc.*, 209 NLRB 181, 188 (1974) (" [I]n view of the fact that the statutory bargaining obligations of a party do not require him to make a concession, it is questionable whether Respondent was legally required to make any counter proposals at all."). Rather, a party's failure to make proposals is one of various factors that may be examined in determining whether it was bargaining in bad faith. In this instance, in view of all the circumstances, I conclude that Respondent's failure to make any proposals or counter-proposals during their first four meetings—by July 18, the period alleged in the complaint—is insufficient to establish a pattern of conduct indicative of bad faith. Simply put, this was very early in the negotiating process. By this early point, it is too premature to judge the totality of the circumstances typically relied upon by the Board in determining whether Respondent had engaged in a pattern of bad faith bargaining. Accordingly, this allegation of the complaint is dismissed.[111]

Regarding the allegation that Respondent failed to vest (or cloak) its negotiator, M Martin, with the authority to "enter into binding agreements," as the complaint alleges, I am not persuaded that the facts support this allegation either. The record shows that M Martin had the authority to negotiate and reach tentative agreements, subject to the ratification by either

[110] This was by M Martin's account, because E Martin was not very precise with his dates or exact number of meetings. There is no evidence as to why it took the parties so long to get negotiations going, or what caused the seemingly long pauses thereafter, but there is no allegation in the complaint that Respondent engaged in delay or dilatory tactics to stall negotiations.

[111] The record indicates that Respondent made its first counter-proposals in late November, but the record isn't clear about how many meetings the parties had between July and November, nor exactly what occurred in those meetings. In any event, the complaint marks the period ending on July 18 as the time frame during which Respondent unlawfully did not make proposals or counter-proposals, and thus that is the time period at issue herein.

Dramise or the board of directors of which he was part. The practice of making agreements subject to ratification is common, both by employers and unions. Indeed, unions in many instances have to submit negotiated agreements to their membership for ultimate ratification and approval, pursuant to their constitutions and by-laws. See, *Valley Cent. Emergency Veterinary Hosp.*, 349 NLRB 1126, 1128 (2007) citing *Teamsters Local No. 173 v. NLRB*, 788 F.2d 27, 32 (D.C. Cir. 1986) ("[i]t is very commonplace in the United States for bargaining parties to reach tentative agreements subject to ratification"). Parties, of course, are obligated to provide clear and timely notice of any such limitation on their negotiators' authority to enter into a final agreement. In that regard, the Board has held that any limitation placed on the negotiating authority of a bargaining representative must be disclosed to the other party before any agreement is reached. *Teamsters Local 771 (Ready-Mixed Concrete)*, 357 NLRB 2203, 2206 (2011), and cases cited therein.

In this case, M Martin provided the Union with timely notice of the limitations on his authority, on their 4th bargaining meeting on or about July 18, before any agreements of any type were reached. Accordingly, I conclude that this allegation of the complaint lacks merit and is therefore dismissed.

13. Respondent's alleged failure to notify and bargain with the Union prior to terminating Arellano, Walker and Servin

In paragraph 6(o) the General Counsel alleges that the termination of these employees was a mandatory subject of bargaining, and that Respondent's failure to bargain prior to imposing these action violated Section 8(a)(1) &(5) of the Act. In *Total Security Management*, 364 NLRB No. 106 (2016), the Board re-affirmed a doctrine that it had earlier announced in *Alan Ritchey, Inc.*, 359 NLRB 396 (2012), a case that in 2014, was subsequently invalidated by the Supreme Court pursuant to its ruling in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). In *Total Security*, the Board ruled that in the interim period between a union's certification and the existence of an initial collective-bargaining agreement, employers have an obligation to notify the union and give it an opportunity to bargain before imposing discretionary and serious (or status-changing) discipline on an employee in the bargaining unit. The Board explained that this obligation to bargain is more limited than applicable to other terms and conditions of employment, and that the parties need not reach an impasse before the employer proceeds to impose discipline, although it remains obligated to continue bargaining after the imposition of such discipline.

Needless to say, given the relative youth of this doctrine, and lack of additional cases post *Total Security*, many questions remain as to the "nuts-and-bolts" of how to apply this new policy the specific situations. For example, it seems reasonable to presume that as with any other issue or situation that requires bargaining, bargaining must be *requested* by the union after it initially receives notification of the intended discipline, before the obligation is applicable. Likewise, given the lack of the requirement that impasse be reached before the employer can proceed to impose the discipline, questions remains to whether one single meeting, even a short one, can satisfy an employer's requirement to bargain, particularly if the evidence suggests, as it does here, that the employer had pretty much committed itself to an irrevocable course of action. Additional questions remain as to the exact burden of proof required of the General Counsel as to

this issue, and about the quantity or quality of information employers must provide the union prior to that initial consultation.

Unfortunately, neither party in this case addressed the issue(s) during the hearing, or in their briefs, perhaps because it was considered a minor issue in light of the multiple allegations involved, or perhaps because there is uncertainty whether this doctrine will remain viable. As of the moment, however, it is current Board law, so I will attempt to address it, albeit briefly.

First, regarding Arellano and Walker, it appears that Respondent did notify the Union about its intent to terminate their employment before going forward with such action, and that some discussions were conducted by the parties regarding Arellano during their February 9 meeting. It is not clear to me on the current record, how much information was provided by Respondent about the specific issue of Arellano or Walker—or whether that information can be deemed sufficient to satisfy the employer's initial requirements. It is not clear either whether the union specifically requested bargaining about Arellano, although it appears (on the emails) to have requested bargaining about the "lay-offs," which would cover Walker.

Based on the above, I am not persuaded that the General Counsel met its burden of proof on this issue with regard to Arellano and Walker, and therefore I dismiss the allegations as to them. Regarding Servin, there is no evidence that Respondent ever notified the Union before it discharged him. Accordingly, I conclude that Respondent violated Section 8(a)(1) & (5) of the Act by not notifying the Union, and giving it an opportunity to bargain, before discharging Servin.

CONCLUSIONS OF LAW

1. Apex Linen Service, Inc. (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. International Union of Operating Engineers Local 501, AFL–CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by maintaining a rule in its employee handbook that directed its employees to refrain from engaging in on-line activities that might embarrass Respondent or might be detrimental to Respondent's business; by interrogating employees regarding their union activities or support for the Union; by creating the impression that its employees' union activities were under surveillance; and by threatening adverse consequences if its employees chose the Union as their representative.

4. Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employees Adam Arellano (on February 13, 2017) and Joseph Servin (on May 2, 2017) and laying off its employee Charles Walker on February 15, 2017, because they supported the Union; and by prematurely closing the engineers' break room in retaliation for their support of the Union.

5. Respondent violated Section 8(a)(1) and(5) of the Act by failing to provide the Union with information it requested; by failing to bargain with the Union regarding the effects of

closing the engineers' break room; by failing to bargain with the Union regarding the schedule changes on or about April 7 and July 5, 2017; by by-passing the Union and bargaining with its employees directly about March 29 and June 21, 2017; by failing to bargain with the Union regarding the implementation of a new cell phone policy; and by failing to give notice to the Union and an opportunity to bargain prior to discharging Servin.

6. Respondent has not otherwise violated the Act as alleged in the compliant.

7. The unfair labor practices committed by Respondent, as described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The appropriate remedy for the Section 8(a)(1)(3) and (5) violations I have found is an order requiring Respondent to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, the Respondent will be required to cease and desist from: maintaining a rule in its employee handbook that directs its employees to refrain from engaging in on-line activities that might embarrass Respondent or be detrimental to Respondent's business; from interrogating employees regarding their union activities or support for the Union; from creating the impression that its employees' union activities is under surveillance; from threatening adverse consequences if its employees chose the Union as their representative; from discharging or laying off its employees because they support the Union; from retaliating in any manner against their employees for supporting of the Union; from refusing to provide the Union with information it requested; from refusing to bargain with the Union regarding the effects of closing the engineers' break room; from failing to bargain with the Union regarding schedule changes; from by-passing the Union and bargaining with its employees directly; from failing to bargain with the Union regarding the implementation of a new cell phone policy; and from failing to notify the Union and giving it an opportunity to bargain before terminating employees.

Respondent shall also cease and desist, in any other manner, from interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

Having found that Respondent unlawfully discharged Arellano and Servin, and unlawfully laid off Walker, Respondent must offer them reinstatement to their former jobs or if those jobs no longer exists, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed. The Respondent shall make Arellano, Servin and Walker whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate them for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with

interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), the Respondent shall compensate them for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 28 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Respondent shall also be required to remove from its files any references to the unlawful termination of Arellano, Servin and Walker and to notify them in writing that this has been done and that their terminations will not be used against them in any way.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since [date of first unfair labor practice]. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 28 of the Board what action it will take with respect to this decision.

Accordingly, based on the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[112]

ORDER

Respondent, Apex Linen Service, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Engaging in any of the conduct described immediately above in the remedy section of this decision;

(b) In any other like or related manner interfering with, restraining, or coercing employees in their exercise of the rights guaranteed them by Section 7 of the Act.

[112] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, if it has not already done so, offer Arellano, Servin and Walker full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Arellano, Servin and Walker whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Furnish the Union the information it requested, as specifically described above in items 1, 2, 4, 5, 8, 9, and 10 of the information requests discussed in the analysis section.

(d) Upon request, bargain with the Union regarding the effects of closing the engineers' break room, and the engineers' schedule changes.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at all its facility in Las Vegas, Nevada, where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[113] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2, 2017.

[113] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" Shall Read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found

Dated, Washington D.C. June 6, 2018

Ariel L. Sotolongo
Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

In recognition of these rights, we hereby notify employees that:

WE WILL NOT maintain a rule in our employee handbook directs our employees to refrain from engaging in protected concerted activity by refraining from posting on-line comments about the Company that might embarrass other employees or be detrimental to the Company's business;

WE WILL NOT interrogate our employees about their union activities or create the impression that their union activities are under surveillance;

WE WILL NOT threaten our employees with adverse consequences if they choose to support the International Union of Operating Engineers Local 501, AFL–CIO (Union), or any other union;

WE WILL NOT, discharge, lay-off or otherwise discriminate against you because you have supported the Union;

WE WILL NOT prematurely close a break room in retaliation for our employees supporting the Union;

WE WILL within 14 days from the date of the Board's Order, offer Adam Arellano, Charles Walker and Joseph Servin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Adam Arellano, Charles Walker and Joseph Servin whole for any loss of earnings and other benefits resulting from their termination, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges or lay-offs of Adam Arellano, Charles Walker and Joseph Servin and

WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharge or lay-off will not be used against them in any way.

WE WILL NOT refuse to bargain with the Union regarding changes to the work schedules of employees represented by the Union, or by-pass the Union and deal directly with such employees.

WE WILL NOT implement any changes in the wages, hours, or working conditions of our bargaining unit employees, including taking disciplinary action, without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT refuse to bargain in good faith with the Union regarding disciplinary action taken against employees represented by the Union, or prior to imposing discipline to such employees in the future.

WE WILL NOT fail or refuse to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the representative of the employees in the bargaining unit;

WE WILL, upon request, bargain with the Union as the exclusive collective bargaining representative of employees in the following appropriate bargaining unit concerning terms and conditions of employment:

> All full-time, regular part-time and extra board Engineers and Utility Engineers employed by the Employer at its facility located in Las Vegas, Nevada; excluding, all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related matter interfere with, restrain, or coerce you in the exercise of rights listed above.

APEX LINEN SERVICE, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-192349 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-416-4755.